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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOSEPH G. STEPARD, MALANIA M. STEPARD
JOHN P. WILDE, PERSONAL REPRESENTATIVE OF
THE ESTATE OF ARTHUR F. SHERRELL

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the presumption of regularity was properly applied to the Certificates of Assessments and Payments, Form 4340, to prove each of the factual elements of the presumption of receipt of the Notices of Assessment required to be mailed to the Petitioner's last known address under with Internal Revenue Code (IRC), § 6303(a) or to prove that the assessment officer signed the summary record of assessment, assessing the Petitioners, in accordance with IRC, § 6203 and 26 CFR, § 301.6203-1?

2. Whether the Petitioners were entitled to additional discovery, under the provisions of Rule 56(f), Federal Rules of Civil Procedure, before the district Court granted summary judgment to the Respondent?

3. Whether the Certificates of Assessments and Payments, Form 4340, which were created after the commencement of litigation in the district Court and only for purposes of litigation, were admissable as either secondary evidence, under the hearsay exceptions, as self-authenticating public records or as computer records, without proper foundation?

4. Whether the Ninth Circuit Court of Appeals should have granted the Petitioner's Petitions for Rehearing with a suggestion for Rehearing En Banc.

THE PARTIES

The only parties are those who appear in the caption of the case.

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The Petitioners, Joseph G. Stepard and Malania M. Stepard (Stepards), hereby Petition this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on June 30, 1995. The Petitioner, John P. Wilde, as the Personal Representative of the Estate of Arthur F. Sherrell (Wilde), hereby Petitions this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on August 22, 1995.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals [App., (Stepards, Pgs. A-1 to A-5; Wilde, Pgs. B-1 to B-6)][1] and the Decisions of the District Courts [App., (Stepards, Pgs. A-9 to A-17; Wilde, Pgs. B-9[2])] were unpublished and are in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment in Stepard on June 30, 1995 (App., Pgs. A-1 to A-5) and in Wilde on August 22, 1995 (App., Pgs. B-1 to B-6) affirming each of the respective district court's[3] grant of summary judgment. On August 10, 1995, the Stepards filed a Petition for Rehearing. On November 27, 1995, the Ninth Circuit denied the Stepards' Petition for

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[1] The Appendix is divided into Appendix A for the Stepards and Appendix B for Wilde. References to pages will be A-(page #) for the Stepards and B-(Page #) for Wilde.

[2] The district Court in Wilde did not enter any findings of fact or conclusions of law.

[3] The action in Stepard was appealed from the Arizona District Court, the action in Wilde was appealed form the Neveda District Court.

Rehearing.[4] (App., Pg. A-7). Wilde requested and received an enlargement of time until October 20, 1995, to file a Petition for Rehearing and filed the Petition on October 18, 1995. On December 6, 1995, the Ninth Circuit denied Wilde's' Petition for Rehearing. (App., Pg. B-7) The jurisdiction of this Court to review both judgments of the Ninth Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the statutory provisions involved are found in Appendix C.

The statutory provisions involved are as follows: 26 U.S.C. §§ 6103(a), (b) and (k)(6), 6203, 6303, 6331 and 7431; 28 U.S.C. §§ 2410(a) & (b) and 2463; 26 CFR §§ 301.6203-1 and 301.6103(k)(6)-1; Rules 35 and 40, Federal Rules of Appellate Procedure (FRAP); Rules 56(b) and 56(f), Federal Rules of Civil Procedure (FRCP); Rules 802, 803(6), 803(8), 902(1), 902(4), 1002 and 1004, Federal Rules of Evidence (FRE); Commissioner's Delegation Orders (CDO) Numbers 161 and 198.

STATEMENT OF THE CASE AND FACTS FOR STEPARD

For the years 1981, 1982, 1984 and 1985 Liens allegedly arose against Petitioner Joseph G. Stepard in the amounts of $10,876.29, $11,044.50, $92,418.00 and $84,219.00 respectively, after abatements were allegedly made on September 28, 1992. The Liens arose out of assessments alleged to have been made on July 22, 1985

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[4] The 90th day from November 27, 1995 is February 25, 1996. However, February 25, 1996 is a Sunday, making February 26, 1996, the last day for filing the Petition. Rule 30.1, Rules of the Supreme Court of the United States.

(1981), July 15, 1985 (1982) and October 3, 1988 (1984 and 1985). For the years 1981, 1982, 1984 and 1985 Liens allegedly arose against Petitioner Malania M. Stepard in the amounts of $10,876.00, $11,045.00, $92,418.00 and $84,219.00 respectively, for assessments alleged to have been made on September 28, 1992. (App., Pg. A-9)

The Petitioners commenced this action in quiet title on January 8, 1993 on the grounds that the liens were invalid due to the Respondent's failure to determine the basis for the existence of the deficiency prior to issuing the Notices of Deficiency, failure to record the assessment in accordance with IRC, § 6203 and 26 CFR, § 301.6203-1, failure to produce the record of assessments upon the Petitioners' request for the record of assessment and the failure to send the Petitioners Notices of the assessment in accordance with the provisions of IRC, § 6303(a). (App., Pg. A-9)

Along with the Summons and Complaint, the Petitioners caused Requests for Admissions and Non-Uniform Interrogatories to be served upon the Respondent. (App., Pg. A-9-10). On February 22, 1993, the Respondent filed a Motion for Protective Order solely on the ground that the Respondent was contemplating dismissal on the threshold question of sovereign immunity. (App., Pg. 10). The Petitioners filed a Motion to Strike the Motion for Protective Order on the ground that the Respondent failed to consult with Petitioners as required by Local Rule and the grounds for the protective order were insufficient. (*id.*)

The Respondents subsequently answered the complaint and admitted that sovereign immunity had been waived. On April 12, 1993, the Respondent filed a Motion for Summary Judgment attempting to dispose of the case on a factual basis, instead of the nonwaiver of sovereign immunity. (*id.*). The Respondent supported the

Motion for Summary Judgment with Certificates of Assessments and Payments arguing that they created a rebuttable presumption that the assessments had been made against the Petitioners and that all the required Notices had been sent. (App., Pg. A-1)

On May 10, 1993, the Petitioners moved to Continue Consideration of the Respondent's Motion for Summary Judgment and Motion to Strike Second Declaration of Eric M. Casper. (App., Pg. A-10). The Court denied the Respondent's Motion for Protective Order, granting the Petitioner's Motion to Strike the Protective Order. and Motion to Continue and ordered the Respondent to respond to the discovery. (*id.*)

On July 27, 1993, the Respondent responded to the Petitioners' First Set of Requests for Admissions and Non-Uniform Interrogatories. The extent of the Court's previous order for the Respondent to respond to the initial discovery required the Petitioners to file a Second Motion to Continue Consideration of Respondent's Motion for Summary Judgment.[5] The Respondent's responses to the initial discovery revealed facts, with respect to the Assessments and notices in conflict with evidence previously submitted under the uncontroverted First Affidavit of Joseph G. Stepard.[6]

The Certificates are prepared exclusively from the data contained in the Individual Master Files (IMF) of

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[5] In addition to the Second Motion to Continue Consideration, the Petitioners served a Second Set of Requests for Admissions and a Second Set of Non-Uniform Interrogatories. The Respondent filed its Second Motion for Protective Order as to this discovery on October 4, 1993. (App., Pg. A-10)

[6] These facts were set forth in the uncontroverted Second Affidavit of Joseph G. Stepard that was filed with the Second Motion to Continue. (App., Pg. 33)

both Joseph G. Stepard and Malania M. Stepard. [App., Pg. A-39), Request No. 96]. The projected date of the assessment[7] is input into the IMF some 10 to 15 days in advance of the assessment actually occurring. The July 22, 1985 assessment date for the year 1981 was input into IMF of Joseph G. Stepard during the week of July 7, 1985 thru July 13, 1985. The July 15, 1985 assessment date for the year 1982 was input into the IMF of Joseph G. Stepard sometime the week of June 30, 1985 thru July 6, 1985. The October 3, 1988 assessment date for the years 1984 and 1985 was input into the IMF of Joseph G. Stepard during the week of September 18, 1988 thru September 24, 1988. The September 28, 1992 assessment date for the years 1981, 1982, 1984 and 1985 was input into the IMF of Malania M. Stepard during the week of September 13, 1992 thru September 19, 1992.

The date the Notices of Assessment were scheduled to be sent to the Petitioners was input into the each of the Petitioners' IMF's at the same time the information for each of the assessment dates noted above was input into the IMF. The Notices of Assessment were mailed before the summary record of assessment was signed by the assessment officer.[8] (App., Pg. A-35 through A-37, ¶¶

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[7] Although the Respondent denied, in the Responses to the First Set of Requests for Admissions, that the assessment date itself was input into the IMF along with the rest of the data the facts and evidence presented by the Petitioner shows otherwise. An assessment date of May 28, 1990, for a Mr. Randal W. Howard appeared in an IMF transcript that was generated on May 17, 1990. [App., Pgs. 33 and 34, ¶¶ 5 through 11; App., Pgs. 29, ¶ 33,]

[8] The government denied that the Notices were mailed out before the summary record of assessment was signed by the assessment officer and further alleged that the Notices were not generated until the date of the assessment. In light of the fact that the alleged assessment date and the Notice date are the same and the Notices

13 through 25). Furthermore, the Petitioners did not receive the Notice of Assessment. (App., Pgs. A-24 and A-25, ¶ 16)

At the same time the Petitioners filed their Second Motion to Continue, they moved to Strike the Certificates. On January 13, 1994, the Court entered its order (See Generally, App., Pgs. A-9 through A-17) granting the Respondent's Motion for Summary Judgment and denying the Petitioners' Motion to Strike Second Casper Declaration, Motion to Continue, Motion to Strike the Certificates and Second Motion to Continue. The Clerk entered judgment the same day. (App., Pg. A-19)

On January 28, 1994, the Petitioners filed a Motion for New Trial or in the Alternative to Alter or Amend Judgment. In the uncontroverted Third Affidavit of Joseph G. Stepard in support of the Motion for New Trial, the Petitioners established that a request had been made for the records of the assessment as to Joseph G. Stepard and the Respondent had yet to produce the requested records and that the IMF "Literal Transcripts" were not responsive to the requests. As the facts set had already shown, the transaction data for the assessments and Notices was input into the computer, including the date of the transaction, before the assessment. Furthermore, the source documents from which the data was input into the computer also existed before the assessment.

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presented by at least 5 other people show that they received their notices **before** the date they were alleged to have been assessed and the fact that the Respondent's counsel already was aware of the early receipt of the Notices at the time the Responses were prepared (See App., Pgs., A-28 through A-30, ¶¶ 30 through 36), leaves the Respondent's responses to the Requests for Admissions highly suspect if not perjured.

On April 7, 1994, the district Court entered its Order denying the Petitioners' Motion for New Trial. On May 28, 1994, the Petitioners filed their Notice of Appeal. On June 30, 1995 the Ninth Court entered its decision. (App., Pgs. A-1 through A-5). The Petitioner filed a for Rehearing and a Petition for Rehearing with a suggestion for Rehearing *in banc* which the Ninth Circuit denied. (App., Pg. A-7). It is the June 30, 1995 decision of the Ninth Circuit Court of Appeals for which Stepards seek review in this Court by certiorari.

STATEMENT OF THE CASE AND FACTS FOR WILDE

For the year 1982 a lien of $920.38 arose against Arthur F. Sherrell from an assessment alleged to have been made on November 28, 1988. For the year 1983 a lien of $1,232.78 arose against Arthur F. Sherrell from an assessment alleged to have been made on December 26, 1988. For the year 1982 an additional lien of $9,315.76 arose against Arthur F. Sherrell from an assessment alleged to have been made on September 11, 1989. For the year 1984 a lien of $2,800.78 arose against the Arthur F. Sherrell from an assessment alleged to have been made on September 11, 1989. For the year 1985 a lien of $1,495.65 arose against Arthur F. Sherrell from an assessment alleged to have been made on September 11, 1989.

This Petition arises from the second appeal to the Ninth Circuit from the district of Nevada. Just as in the previous appeal the Petitioner appealed the district Court's grant of summary judgment in favor of the Respondent. This action began when the Arthur Sherrell and his wife filed a complaint seeking to quiet title tax liens which had arisen from the several assessments, as identified above, alleged to have been made against the Sherrells. The complaint further sought damages for

unauthorized disclosure of return information. (App., Pgs B-1 through B-6). The Respondent moved for dismissal or in the alternative for summary judgment. On June 5, 1990, the district Court dismissed the quiet title claim, but ordered the Petitioners to amend the complaint with respect to the unauthorized disclosure claims. (App., Pgs. B-17 through B-19)

The Respondents amended the complaint, continuing the quiet title claims and at the same time moving to vacate the dismissal of the quiet title as erroneous. The Court denied the Motion to Vacate. (App., Pg. B-22). The Petitioners then sought leave to amend to state only those matters with respect to the unauthorized disclosure claims. The Respondent then renewed its Motion to Dismiss[9]. (App., Pg. B-14) On March 5, 1991 the Court granted the Respondent's Motion to Dismiss the unauthorized disclosure claims. In doing so the district Court considered matters outside the pleadings effectively making a no notice *sua sponte* grant of summary judgment. On June 2, 1992, in the first appeal at docket number 91-15979, the Ninth Circuit reversed the judgment that the district Court had entered with respect to both the quiet title claims and the unauthorized disclosure claims. In its unpublished opinion, the Court reversed the judgment on the quiet title claims holding that it was error to dismiss based upon the Respondent's assertion of sovereign immunity. It further reversed the judgment on the unauthorized disclosure claims holding that it was error to grant summary judgment *sua sponte* and without notice when the nonmoving party is proceeding without an attorney. (App., Pgs. B13 through B-16)

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[9] The Defendants did not renew the alternative motion for summary judgment.

After remand, and within 30 days of the issuance of this Court's mandate, the Respondent moved for summary judgment based solely on the doctrine of the "law of the case" and relying on the district Court's alledged findings in the March 5, 1991 order. Before the Petitioners received the Respondent's Motion for Summary Judgment, the Petitioners sought leave to amend and supplement the pleadings. The Petitioners apposed the Motion for Summary Judgment first with a Motion to Strike and then after being ordered by the Court in response to the Motion for Summary Judgment. The Petitioners further moved to continue consideration of the Respondent's Motion for Summary Judgment.

On September 29, 1992, the Court denied the Motion for Leave to Amend. On February 17, 1993, the Court entered judgment in favor of the Respondents and on February 23, 1993 the Court issued its order granting the same.[10] On March 8, 1991, the Plaintiffs filed their Notice of Appeal. The Ninth Circuit entered its judgment affirming the district Court's grant of summary judgment in favor of the United States. (App., Pgs. B-1 through B-6). The Petitioners filed both a Petition for Rehearing and a Petition for Rehearing with the suggestion for Rehearing *in banc* which was denied by the Ninth Circuit on December 6, 1995. (App., B-7). It is the June 30, 1995 decision of the Ninth Circuit Court of Appeals for which Stepards seek review in this Court by certiorari.

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[10] The Petitioner's Motion to Defer Consideration of the Respondent's Motion for Summary Judgment was orally denied on February 11, 1993. The Minutes entered in the record on February 16, 1993 reflect the denial. (App., Pg. B-9)

REASONS FOR GRANTING WRIT & ARGUMENT

I. Summary Judgment Generally. The Ninth Circuit upheld the district Court's grant of summary judgment in favor of the Respondent. The Respondent had the burden of proof of showing that there were no genuine issues. *Celotex Corp. v. Catrett*, 477 US 317, 323, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). Before the trial court considers the Motion, the respondent was required to show that it has met its initial burden of production. *Adickes v. S.H. Kress & Co.*, 398 US 144, 157-161, 51 L.Ed. 2d 260, 97 S.Ct. 990 (1970).

II. The Ninth Circuit's judgment that the presumption of regularity proved the substantive factual elements that the Petitioners presumptively received the Notices of Assessment and that the Assessment Officer recorded the assessment against the Petitioners was made in a way that conflicts with the relevant decisions of this Court and to the extent that it that issue involves IRC, §§ 6203 and 6303 has decided a question of federal law that has not been, but should be, settled by this Court.

As a general rule a government official in the performance of his duties enjoys the presumption of regularity. However, that presumption does not supply proof of a substantive fact. *Chicago, M, & St. P. R. Co. v. Coogan* 271 US 472, 477, 70 L.Ed 1041, 1045, 46 S.Ct. 559 (1926); *Ross v. U.S.*, 92 U.S. 281, 284-85, 23 L.Ed. 707 (1876).

The Petitioners contend they did not receive the Notices of Assessment required to be mailed under IRC, § 6303 and that the Assessment Officer did not record the assessments against them, as required by IRC, § 6203. In each circumstance, the government supplied Certificates of Assessments and Payments (Certificates)

and then asserted that the presumption of regularity attaches to them, to prove that the Notices were mailed and that the assessments were recorded.

IRC, § 6303 requires that the Notice be given or mailed to the last known address after the assessment and within 60 days of the assessment. The government need not prove that the Petitioners received the Notices only that it was sent. A letter is presumed to have been received if the sender shows that the letter was properly addressed, with sufficient postage and that it was properly deposited in the mail. *Hagner v. United States*, 285 US 427, 430-31, 76 L.Ed. 861, 52 S.Ct. 417 (1932).

In both cases the Ninth Circuit relied upon the Notice entries in the Certificates[11] and then attached the presumption of regularity to prove the facts that the Notices were properly mailed, thus, concluding that the Petitioners received the Notices. (App., Pg. B-4) See *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir., 1993). The Petitioners denied receiving the Notices. (App., Pg. A-24-A-25, ¶16). The denial of receipt was sufficient to overcome the presumption of receipt, requiring the Respondent to prove mailing. *Rosenthal v. Walker*, 111 US 185, 193-94, 28 L.Ed 395, 4 S.Ct. 382 (1884); *In re Yoder*, 758 F.2d 1114, 1118 (6th Cir., 1985)

> The presumption so arising is not a conclusive presumption of law, **but a mere inference of fact**, founded on the probability that the officers of the government will do their duty and the usual course of business, and when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, **by the**

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[11] See Appendix, Page A-45, "Notice of Balance Due" entry for the Stepards and Page B-45, "Statement of Change to your account was mailed out 9/11/89" entry.

jury in determining the question whether the letters were actually received or not."

IRC, § 6203 and 26 CFR, § 301.6203-1 states that the assesment is made by the assessment officer signing the summary record of assessment. The government used the "23C" date entries on the Certificates to claim that the Petitioners were assessed on those dates. The record shows that the assessment information in the Certificates is taken from the Individual Master Files of the Petitioners and not the Assessment Record signed by the assessment officer. (App., Pgs A-40). Given that the record also reflects that the assessment date in the IMF is entered before the actual assessment, no presumption that the assessment was made can be found in the Certificates. The regulation does not say that the assessment is made by entering into the computer 10 days to two weeks in advance of the assessment.

> [i]t is not the law that a court can conclude that the property was delievered by the military officer to a treasury agent, that it was sold by him, and that the proceeds were covered into the treasury. The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact.
> *Sabariego v. Maverick*, 124 US 261, 284, 31 L.Ed. 430 8 S.Ct. 461 (1888) citing *Ross*, supra.

Neither can it be the law that a court can conclude that the IRS properly mailed the Notices of Assessment or that the Assessment Officer recorded the assessment against the Petitioners. The presumption of regularity cannot be used to prove the factual elements for mailing that would give rise to the presumption of receipt, once receipt is denied. Nor can the presumption be applied to

the certificates to prove that the assessments were recorded when the data from the source record for the Certificates is input into the computer many days before the actual event.

III. The Ninth Circuit's judgment that the Petitioner's were not entitled to a continuance of consideration of the Respondent's motion for summary judgment decided an important federal question in a way that conflicts with the relevant decisions of this court.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 242, 251, 91 L.Ed.2d 202, 105 S.Ct. 2505 (1986)], the Court held that Rule 56(e) provides that; "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" However, the Court underscored that by further noting:

> This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the non-moving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery. Id. at n. 5.

In *Celotex*, supra, this Court again held that "Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" **but only** "**after** adequate time for discovery." 106 S.Ct. at 2552-53. In concluding that the district court had properly granted summary judgment, the Court noted that "[t]he parties had conducted discovery, and no serious claim can be made

that respondent was in any sense 'railroaded' by a premature motion for summary judgment." 106 S.Ct. at 2554. Recognizing that premature motions present a problem, the court concluded that the problem:

> "can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the non-moving party has not had an opportunity to make full discovery". 106 S.Ct. at 2554-55. (emphasis added)

In *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), the Court considered it significant that the parties had conducted "several years of detailed discovery." This court has never set out any specific standards for obtaining relief under Rule 56(f). The Ninth Circuit has. The party seeking discovery must have diligently pursued its previous discovery opportunities and if the movant can show how allowing additional discovery would have precluded summary judgment. *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir., 1994); *Garrett v. City and County of San Francisco*, 818 F.2d 1515 (9th Cir., 1987) (affidavit must show what facts and evidence is sought; how the party intends to obtain the facts; how the facts are reasonably expected to create a genuine issue of material fact; what efforts the party has made to obtain them and why they were not successful). The Ninth Circuit has also held that an affidavit of non-receipt of a notice is sufficient to justify conducting limited discovery in that area. *Farr v. United States*, 990 F.2d 451, 454 n.1 (9th Cir., 1993). Nevertheless both Petitioners were denied discovery. Suffice it to say that the decisions in both cases left no doubt that the Court demanded a higher standard of proof than is generally required for the continuance under Rule 56(f).

The record in both cases also shows that neither was given ample opportunity for discovery. In *Stepard*, they served discovery with the summons and complaint, but the government objected and it was more than seven and one half months before the district Court finally ordered the Respondent to answer, and then the Stepards were required to respond to the motion for summary judgment within thirty days after the government's response, without any consideration about what further discovery might be needed after the responses were made.

In *Wilde*, no discovery was permitted before the first dismissal. After the Ninth Circuit reversed, the court issued a scheduling order setting discovery deadlines. However, the government filed its motion for summary judgment less than 20 days after issuance of the schedualing order.

In both cases, the government either delayed answering discovery until such time as it could get its summary judgment motion in (Stepard) or avoided discovery by constantly ambusing the court with a motion for summary judgment. (Wilde). It was improper for the Ninth Circuit to have condoned the government's actions.

IV. The Ninth Circuit's judgment that the Certificates were admissable decided an important federal question in a way that conflicts with relevant decisions of this court and to the extent that the Certificates are admissable as either secondary evidence, under the hearsay exceptions, as self-authenticating public records or as computer records, without proper foundation is an important question of federal law that has not been, but should be settled by this Court.

As the Petitioners discussed in Part II, supra, the entries contained in the Certificates are nothing more than a listing of the Transaction Codes taken from the

Petitioners' IMF transcripts. The record also shows that that data is entered in the computer anywhere from 10 days to two weeks before the transaction or event. The computer data does not record the event after it occurs.

Even more aggregious is that the Certicates that contain this projected event data, is not even produced until **after** litigation is begun. Arthur Sherrell began he and his wife's action in August of 1989. The date on the Cerificates is 10-05-89 (App., Pg. B-45). Nearly 2 months later. The Stepards began their action in January of 1993. The Certificates were prepared on March 9, 1993 (App., Pg. A-46) more than 2 months after the action was begund. Such documents have been held to be inadmissable. See *Palmer v. Hoffman*, 318 US 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943) (Documents that are prepard for use in litigating in admissable)

As to their admissability as secondary and under any hearsay exceptions, their trustworthiness is certainly suspect. Given that the data, that is the source of the information in the Certificates, is entered before the actual event. Also several GAO reports and accounts show that the IRS computer system is wrougt with significant accounting errors. (See App., Pgs. A-27-A-28, ¶¶ 25-28; A-31. ¶ 40; B-33, ¶¶ 24-27; B-36, ¶ 37) See also *Brafman v. U.S.*, 384 F.2d 863, 866 (5th Cir., 1967) (Authenticated but unsigned summary record of asessment (23C) not sufficient to establish validity of assessment)

Nor can the Certificates be admitted as self-authenticating. In this case, the custodian of the record used to generate the Certificates is the Director of the Martinsburg Computer Center. Both the district court and the Ninth Cirucuit concentrated their decisions on seal affixed to the Form 2866, which is used to certify treasury documents. The petitioners abjection was not with who had the authority to affix the seal on the Form

2866. At the same time the seal was affixed to the 2866, the Service Center Director in *Stepard* and collection officer Ron Smith in *Sherrell* were affixing the IRS seal and certifing the data in the Certificates. These gentleman were not the custodian of the record used to generate the 4340, therefore, they were not delegated the authority to do so. See *Commissioner's Delegation Order*, (CDO) number 198, ¶ 3. While the delegation order does identify them, the language of the paragraph limits their ability to make such a certification, only for documents **over which they are the custodian.** Rule 902(1) and (4), Federal Rules of Evidence.

V. The Ninth Circuits failure to grant rehearing involves a question of federal law that has not been, but should be, decided by this Court.

The Appellate Courts are granted broad discetion in deciding whether to grant or deny a petition for rehearing or a petition for rehearing with a suggestion for rehearing in banc. However, the extent of that discretion has not been decided. The discretion is not so unbridled and not so broad as to give the appellate Court the authority to ignore Petitions that fall within the provisions of Rules 35 and 40, Federal Rules of Appellate Procedure. cf. *United States v. Rogers*, 461 US 677, 709, 76 L.Ed.2d 236, 103 S.Ct. 2132 (1983)

> To say that district courts need not always go ahead with a forced sale authorized by § 7403[12] is not to say that they have unbridled discretion. We can think of virtually no circumstances, for example, in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself.

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12 Referring to § 7403 of the Internal Revenue Code.

By analogy, to say that the Ninth Circuit need not always exercise its discretion in granting a Petition under Rules 35 and 40 is not to say that the Court has unbridled discretion. There should be virtually no circumstances in which it would be permissible to refuse to grant rehearing where the decision by the Court is shown to be in such conflict or is shown to have ignore or misapplied the law or facts. That occurred in both appeals.

In *Stepard*, they had requested and but had not received a copy of the record of assessment in accordance with IRC, § 6203. Relying on *Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir., 1993), the court held that since the Certificates had been procduced that was all that the Stepards were entitled to. That very reasoning was rejected by another panel in the Ninth Circuit in *Huff v. United States*, 10 F.3d 1440, 1445 (9th Cir., 1993)

In *Wilde*, the Court affirmed the dismissal without considering that one of the amended complaints at least as far as the quiet title claims are plead, constituted an amendment once as a matter of course, since prior to each of the amendments being submitted, the government had not filed a responsive pleading. Only summary judgment or dismissal motions. The first and third amended complaints contained addition claims, that if considered to have been the amendment as a matter of course would have over come the Ninth Circuit's objections to the addtional claims. (App., Pg. B-5 and B-6)

Also in *Wilde*, there is clearly a growing split in the circuits regarding unauthorized disclosure claims under IRC, § 7431. There are currently three (3) schools of thought developing in the Courts. See *William E. Schrambling Accountancy Corp. v. United States*, 937 F.2d 1485 (9th Cir., 1991); *Lampert v. United States*, 854 F.2d 335 (9th Cir., 1988) *cert. denied*, 490 US 1034, 109

S.Ct 1931, 104 L.Ed.2d 403 (1989); *United States v. Posner*, 594 F. Supp. 930, 936 aff'd on other grounds 764 F.2d 1535 (11th Cir., 1985); *Thomas v. United States*, 671 F.Supp 15, aff'd 890 F.2d 18 (7th Cir., 1989) ("Once tax return information is made a part of the public domain, the information is no longer confidential.")

The "validity test" is based on the premise that return and return information is confidential until there is some authority to make the disclosure when the disclosure is made and damages are proper even if a previous valid disclosure was made. *Mallas v. U.S.*, 993 F.2d 1111 (4th Cir., 1993); *Rorex v. Traynor*, 771 F.2d 383 (8th Cir., 1985); *Rogers v. Hyatt*, 697 F.2d 899 (10th Cir., 1983); *accord, Chandler v. United States, 687 F.Supp. 1515, aff'd 887 F.2d 1397 (10th Cir., 1989) (per curiam).* The contrary to this postion has been reached *Huff v. United States*, 10 F.3d 1440 (9th Cir., 1993); *Farr v. United States*, 990 F.2d 451 (9th Cir., 1993) .

These are just 3 of the examples raised in the Petitioners' Petitions for Rehearing. For each and every claim, the Petitioners fell within the scope of relief for both rehearing and rehearing with a suggestion for rehearing in banc. In hearing this Petition on its merits, this Court should firmly set in place the standards upon which the appellate courts should use in determining when to grant or deny rehearing. As it is now, all the appellate courts need do is deny the relief on appeal, and even thought the decision is incorrect, simply refuse to grant rehearing. That is not justice.

CONCLUSION

The district court disposed of both actions on summary judgment. As the party moving for summary judgment, the United States had the burden of proof of establishing that their were no genuine issues of material fact in dispute. Not only did the United States meet its burden, but it attempted to use the presumption of regularity to prove the substantive facts that gave rise to the presumption that the Petitioners received the notices required to be given under IRC, § 6303. In addtion, the United States used generally inadmissable Certificates of Assessments and Payments, to prove procedural compliance with IRC, § 6203 and § 6303, because they were prepared for litigation and not for record keeping purposes during the course of an officer duty under the law and it was not properly certified for admission as a self-authenticating document. Even if the Certificates were admissable, the United States failed to lay the necessary foundation required for secondary evidence, heresay, public records and computer records. Furthermore, the United States used the summary judgment motion, not to legitamately address the issues, but as a mechanism to avoid proper discovery.

In each case the Ninth Circuit held that the presumption of regularity proved substantive facts that gave rise to the presumption that the Petitioners received the notices required to be given under IRC, § 6303, permitted the admission of the Certificates of Assessments and Payments and held that the Petitioners were not entitled to discovery. Finally, when the Ninth Circuit's failed to consider facts or law presented on appeal, or ruled on issues in a way that conflicted with published opinions, or there were already conflicts in published decisions, the Ninth Ciruit refused to grant the Petition for Rehearing filed by both Petitioners.

Accordingly, and for the forgoing reasons, this Court should issue the Writ of Certiorari to the Ninth Circuit Court of Appeals for both Petitioners.

RESPECTFULLY SUBMITTED this 26TH day of February, 1996.

JOSEPH G. STEPARD
c/o P.O. Box 3314
West Sedona, Arizona 86340
(520) 282-3296
Petitioners, In Pro Per

MALANIA M. STEPARD

JOHN P. WILDE, as the personal representative of the Estate of
ARTHUR F. SHERRELL
c/o 5804 W. Vista Ave #165
Glendale, Arizona 85301
(602) 841-4775
Petitioner, In Pro Per

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APPENDIX A
STEPARD

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JUNE 30, 1995

JOSEPH G. STEPARD MALANIA M. STEPARD	)	No. 94-16037
Plaintiffs-Appellants,	)	D.C.No. CV-93-0060-RCB
v.	)	
UNITED STATES OF AMERICA	)	MEMORANDUM*
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Submitted June 26, 1995**

Before: O'SCANNLAIN, LEAVY, and HAWKINS, Circuit Judges.

Joseph and Malania Stepard appeal pro se the district Court's summary judgment for the United States in the Stepards action seeking to quiet title to their

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

property pursuant to 28 U.S.C. § 2410. The Stepards challenge the validity of the tax leans placed on their property by the Internal Revenue Service ("IRS") for tax liabilities for 1981, 1982, 1984, and 1985. The Stepards also appeal the district court's denial of their motion for a continuance pursuant to Fed. R. Civ. P. 56(f), and denial of their motion to alter or amend the judgment pursuant to Fed. R. Civ. P. We review de novo the district court's grant of summary judgment. Huff v. United States, 10 F.3d 1440, 1443 (9th Cir.) Cert. denied, 114 S.Ct. 2706 (1994). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Quiet Title

The Stepards contend that the district court erred by granting summary judgment for the United States on their quiet title claim because the IRS (1) failed to make determinations of deficiencies; (2) failed to properly assess their taxes pursuant to Internal Revenue Code ("IRC") § 6203; (3) failed to isse notices of assessment and demands for payment pursuant to IRC section 6303; (4) failed to respond to their request for copies of the record of assessment; and (5) failed to properly certify the certificates of assessment.

Section 2410 provides that "the United States may be named a party in any civil action or suit in any district court ... to quite title to ... real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a). The taxpayer may challenge only the procedural aspects of the tax liens, not the merits on the underlying assessment. Elias v. Connett, 908 F.2d 521, 527 (9th Cir., 1990)

Here, the Stepard's claim that the IRS failed to make determinations of deficiencies addresses the merits of the assessment and ar thus not actionable under section

2410. See id.; Huff, 10 F.3d at 1445. The Stepard's remaining claims present procedural challenges to the validity of the IRS's tax lien and are therefore congnizable under section 2410. See id.

1. Assessments and Requests for Copies: Section 6203

The Stepards contend that the IRS failed to properly assess their taxes pursuant to section 6203. The Stepards also contend that the IRS failed to respond to their request for copies of the assessment under 26 U.S.C. § 6203. The contentions lack merit.

"Generally, courts have held that IRS Form 4340 provides at least presumptive evidence that a tax has been validity assessed under section 6203." See Huff, 10 F.3d at 1445

Here, the government submitted a Form 4340 for both of the Stepards. These forms set forth, for each of the taxable years: their names and social security numbers; the amounts of the tax, penalties, and interest; the type of tax assessed; the period for which the tax was assessed; the date on which the tax was assessed (the "23C date"); and the dates various notices were sent.

Thus, the IRS submitted presumtive evidence that it properly assessed the Stepards' taxes for the years in question. See id. at 1446. Furthermore, because the Forms set forth all the information that section 6203 requires, the IRS submitted presumptive evide that the Stepards were given all the documentation they were entitled to under section 6203. See Koff v. United States, 3 F.3d 1297, 1298 (9th Cir., 1993) (per curiam) (citing James v. United States, 970 F.2d 750, 755 (10th Cir., 1992) ("notices [of assessment] also satisfy 26 U.S.C. § 6203, the requirement that the IRS provide a copy of the record of assessment.")), cert. 114 S.Ct. 1537 (1994). The Stepards failed to present sufficient evidence to rebut the presumption that the assessment were valid.

Accordingly, the district court properly granted summary judgment for the IRS on these issues. See Hughes v. United States, 953 F.2d 531, 536 (9th Cir., 1992).

2. Notice of Assessment Pursuant to Section 6303

The Stepards contend that the IRS failed to properly issue the notices of assessment and demand for payment pursuant to section 6303. This contention lacks merit.

Section 6303 requiest that a notice of assessment must be sent to the taxpayer within 60 days after making an assessment pursuant to section 6203. 26 U.S.C. § 6303. "Form 4340 is probative evidence in and of itself and, in the absence of contrary eviden, is sufficient to establish that notices and assessments were properly made." Hansen [v. United States], 7 F.3d [137] at 138 [9th Cir., 1993)].

Here, Form 4340 supports the government's contention that timely notices and demands were sent to the Stepards for the tax years in quiestion. The Stepards contend that they never received the notices of assessment. The failed, however, to present any specific facts showing that the IRS did not send the notices and demands. Thus, the district court properly granted summary judgment for the IRS on this issue. See. id.

The Stepards also contend that the district court erred by considering the certificates of assessment because (1) the IRS failed to properly certify them, and (2) they were submitted under the Second Declaration of Eric Casper, the government's attorney who lacked personal knowledge regarding the certificates. The contentions lack merit.

First, Certificates of Assessment are admissible as self authenticating under Fed. R. Evid. 902(1) when they are accompanied by a Form 2866 certification that is under seal and bears the appropriate signature. Hughes, 953 F.2d at 540. Here the Director of the Ogden Service

Center, who signed the certifications, is a proper person to sign the documents, and the certificates are therefore self-authenticating. See id.; Long v. United States, 972 F.2d 1174, 1181 ([10]th Cir., 1992) (rejecting taxpayer's argument that the District Director of the Ogden Service Center was ineligible to certify the Form 4340).

Second, Mr. Casper's declaration merely states that he possessed the original Forms 4340 and the original Forms 2866 certifying them, and that the copies he submitted were correct. An attorney's declaration may be submitted with a motion for summary judgment under these circumstances. See e.g., Lockwood v. Wolf Corp. 629 F.2d 603, 611 (9th Cir., 1980)

II

Other claims.

The Stepards contend that the district court erred by granting summary judgment without allowing them additional time to conduct further discovery. This contention lacks merit.

The Stepards failed to show how allowing additional discovery would preclude summary judgment. See Qualls v. Blue Cross of Cal., 22 F.3d 839, 844. (9th Cir., 1994). Accordingly, the district Court did not abuse its discretion by denying the Stepard's motion for a continuance. See id.

Finally, the Stepard[s] contend that the district court erred by denying ther motion to alter or amend the judgment. This contention also lacks merit.

Here, the Stepards failed to meet the requirement for relief under Rule 59(e). See School Dist. No. 1J v. A,C and S. Inc. 5 F.3d 1255, 1262 (9th Cir., 1993). Accordingly, the district court did not abuse its discretion by denying the motion. See id.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED NOVEMBER 27, 1995

JOSEPH G. STEPARD MALANIA M. STEPARD	)	No. 94-16037
Plaintiffs-Appellants,	)	D.C.No. CV-93-0060-RCB Arizona (Phoenix)
v.	)	
UNITED STATES OF AMERICA	)	ORDER
Defendant-Appellee.	)	

Before: O'SCANNLAIN, LEAVY, and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requrested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Filed Jan 13, 1994

JOSEPH G. STEPARD MALANIA M. STEPARD	)	
Plaintiffs,	)	No. CIV 93-0060 PHX RCB
v.	)	
	)	ORDER
UNITED STATES OF AMERICA	)	
Defendant	)	

I. PROCEDURAL BACKGROUND

Pro se plaintiffs Joseph and Malania Stepard's complaint challenges the validity of various federal income tax assessments and related liens for the taxable years 1981, 1982, 1984 and 1985[1] Their complaint alleges that the Defendant's liens are invalid because defendant (1) failed to make a determination of a deficiency before issuing notices of deficiency, (2) failed to properly record the assessments, and (3) failed to give notice of the assessments within sixty days after makeing the assessment. Plaintiffs further alleged that defendant has waived its sovereign immunity pursuant to 28 U.S.C. § 2410.

Simultaneous with the filing of their cmplaint plaintiffs served on defendant plaintiffs' First Set of

[1] Plaintiffs did not file federal income tax returns for any of those years except for 1982 when Joseph Stepard filed a no liability return.

Requests for Admissions and Non-Uniform Interrogatories. Defendant then sought a protective order pursuant to Fed. R. Civ. P. 26(c), and plaintiffs responded by filed a Motion to Strike Defendant's Motion for Protective Order. Prior to the court ruling on those motions, the Defendant moved for summary judgment. In response to that motion, plaintiffs filed a Motion to Continue Consideration of Defendant's Motion for Summary Judgment (the "First Motion to Continue") under Fed. R. Civ. P. 56(f). Plaintiffs also filed a Motion to Strike Second Declaration of Eric M. Casper.

By Order dated June 30, 1993, the court denied defendant's Motion for Protective Order and granted plaintiff's Motion to Strike. The court directed defendant to answer or respond to plaintiffs' First Set of Requests for Admissions and Non-Uniform Interrogatories within thirty days. The court further stated that within thirty days after defendant served its answers or responses, plaintiff could file a supplemental response to defendant's Motion for Summary Judgment.

On August 30, 1993, plaintiffs filed a Memorandum of Points and Authorities in Support of Secodn Motion to Continue Consideration of Defendants Motion for Summary Judgment (the "Second Motion to Continue"),[2] contending that the court's June 30, 1993 Order "did not take into account that Defendant's responses would require the Plaintiffs to make further discovery." Plaintiffs also filed an Objection to and Motion to Strike Certificates of Assessments and Payments. Defendant

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[2] Plaintiffs did not file the motion itself. However, they apparently served the motion on the defendant as defendant's response purported to quote from the motion. Thus, rather than refusing to consider plaintiffs' memorandum of points and authorities in support of the non-filed motion, the court will treat the memorandum as a motion.

opposes both of these motions and has filed a Second Motion for Protective Order.

II. DISCUSSION

Before addressing defendant's Motion for Summary Judgment, the court must consider plaintiffs' various motions.

A. Motion to Strike Second Declaration of Eric M. Casper

Attached to defendant's Motion for Summary Judgment is the Second Declaration of Eric M. Casper, counsel for defendant. The Declaration states that Casper possesses the relevant Certificates of Assessment and has attached them to his Declaration.

Plaintiffs argue that the Declaration is invalid because a declaration is not a proper substitute for an affidavit. They further contend that the declaration should be striken because it is not based on personal knowledge.

The court rejects plaintiffs' arguments. An unsworn declaration has the same force and effect as a sworn affidavit if it is signed, dated and carries a declaration that the statement is true and under penalty of perjury. 28 U.S.C. § 1746. Casper's declaration meets these requirements. Moreover, because the Declaration merely states that Casper possesses certain documents and has attached them, plaintiffs' argument that the Declaration is not based on personal knowledge is meritless. Cf. Vote v. United States, 753 F.Supp. 866, 868 (D.Nev. 1990) (Affidavit of I.R.S. official based upon her review of taxpayer's records meets person knowledge requirement of Fed. R. Civ. P. 56(e)).

B. Motion to Strike Certificates of Assessments and Payments.

Plaintiff's Motion to Strike Certificates of

Assessments and Pyamentsstates that the Certificates of Assessments are inadmissable because they are not signed by the "Official Custodian of the Individual Master Files" and contain a Treasury Seal that was affixed by a person who does not have the authority to affix the Treasury Seal.

In Huges v. United States, the court held that Certificates of Assessments are admissable when accompanied by a Form 2866 certification that is under seal and bears an appropriate signature. 953 F.2d 531, 540 (9th Cir., 1992). The Cerficates of Assessment in this case are attached to Form 2866 documents which are under seal and are signed by Michael S. Bigelow, the Director of the Ogden Service Center. Plaintiffs have presneted no credible evidence demonstrating that Bigelow is not an "appropriate person" to sign a Form 2866. Accordingly, their motion to strike is denied.

C. Motions to Continue Consideration of Defendant's Motion for Summary Judgment.

In plaintiff's First Motion to Continue, they argued that they were unable to prepare opposing affidavits to demonstrate the existence of genuine issues of material fact because defendant had not responded to their Requests for Admissions and Interrogatories. In the court's June 30, 1993 Order, it directed defendant to respond to plaintiff's Requests and allowed plaintiffs thirty days after service of defendant's responses to file a supplemental response to defendant's Motion for Summary Judgment.

Rather than filing a supplemental response to defendatn's summary judgment motion, plaintiffs have instead filed a Second Motion to Continue which states that "they can, through continue discovery, overcome the rebuttable presumption created by the certificates of assessments and payments that were prepared from

highly questionable records." Plaintiffs assert that further discovery will demonstrate that defendant "has absolutely no way of establishing that the amounts contained [the I.R.S.'s] Individual Master Files are in any way contained in the Summary Record of Assessment [because] [t]he two computer systems that maintain and generate the records are substantially incompatible and do not directly communicate with each other." Plaintiff thus asserts that the I.R.S.'s "entire computer system must be made subject to discovery." Plaintiff also argues that defendant must produce evidenc of when notices of deficiency were mailed to plaintiffs as well as evidence that those notices were properly addressed to plaintiffs and deposited in the mail.

Rule 56(f), Fed. R. Civ. P. provides:

> Should it appear from the affidavits of the party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depostions to be taken or discovery to be had or may make such other order as is just.

The mere hope that discovery may yield further evidence is not a sufficient basis for a continuance under Rule 56(f). Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Traders Dist. Council, 817 F.2d 1391, 1395 (9th Cir., 1987). Rather, the party seeking the continuance must make clear what information is sought and how that information would preclude summary judgment. Garrett v. City and County of San Francisco, 818 F.2d 1515, 1518 (9th Cir., 1987)

In this case, the plaintiffs have not satisfied the dictates of Rule 56(f). Their bald allegations that further

discovery will somehow reveal irregularities in the I.R.S.'s computer system of record are not supported by any evidence in the record. See Rossi v. United States, 755 F.Supp. 314 (D. Or. 1990), aff'd 923 F.2d 863 (9th Cir., 1993). Furthermore, their contention that the defendant must provide further proof of delivery of the notices is not correct. The Ninth Circuit has held that a Certificates of Assessment "is an official document which establishes that assessments were made." Hughes, 935 F.2d at 535. Moreover, plaintiffs do not dispute that they received notices of liens, and such notices satisfy the notice requrements of 26 U.S.C. § 6303(a). id. at 536. Thus, the I.R.S. need not come forth with furthe evidence of mailing the deficiency notices. id.

The court denies plaintiff's motion to continue consideration of the summary judgment motion. Plaintiffs not made an alternative request for additional time to respond to the summary judgment motion, and the court will not offer any such extension. See Local Rule 11(l). The court's June 30, 1993 Order allowed the plaintiffs to file a supplemental response within a specified period, but they elected not to. A Rule 56(f) motion is not designed as a device to allow a party to evade a ruling on a motion for summary judgment. Accordingly, the court will now proceed to the merits of the defendant's motion.

D. Motion for Summary Judgment.

In its Motion for Summary Judgment, defendant argues that (1) the United States has not waived its sovereign immunity from claims challenging the merits of a tax assessment, including whether it made a determination of plaintiffs' deficiency; (2) the Certificates of Assessments appended to defendant's statement of facts are admissable to demonstrate that the assessments were properly recorded; (3) the officeal acts of the

Internal Revenue Service enjoy the presumtion of procedural regularity that can only be overcome by clear and convincing evidence to the contrary; and (4) recitation in the Certificates of Assessments is sufficient to show that notice was sent to plaintiffs.

Pursuant to 28 U.S.C. § 2410, the United States has waived sovereign immunity only form claims which contest the procedural validity of a tax lien. Elias v. Connett, 908 F.2d 521, 527 (9th Cir., 1990). It has not waived its sovereign immunity from claims which challenge the merits of the underlying assessment. id. Plaintiffs' allegation that defendants failed to make a determination of a deficiency before issuing notices of deficiency addresses the merits of the assessment rather than the procedural validity of the the I.R.S.'s lien. Id. Thus, the United States has not waived its sovereign immunity on that claim, and the court will consider it.

Plaintiffs' allegation that defendant failed to properly record the assessments must also fail as a matter of law. Plaintiffs admit that the Certificates of Assessment create a rebuttable presumption of validity, but contend that the presumption is not conclusive. In Farr v. United States, the court reconized that a Certificate of Assessment is "proper evidence of the propriety of the assessment proceedingss in all particulars." 990 F.2d 451, 454 (9th Cir., 1993) cert. denied, 62 USLW 3409 (U.S> Dec. 13, 1993) (citing Hughes, 953 F.2d at 539 at 539-40). The court added, however, that the assessments are not necessarily conclusive if a plainti presents evidence of a miscue. id. at 454.

In this case, the plaintiffs' lengthy discussion concerning the alleged irregularityies in the I.R.S.'s computer system fails to suggest any evidence regarding noncompliance with procedures by the I.R.S. See Rossi, 755 F.Supp. at 318. As such, plaintiffs have failed to present any evidence to overcome the presumption of the

validity of the Certificates of Assessments. Thus, because the Certificates of Assessment are official documents that establish that the assessements were made, and becuase plaintiffs have presented no evience to the contrary indicating that the assessments were not properly recorded, their argument fails. See Hughes, 953 F.2d at 535.

Plaintiffs' final allegation is that defendant failed to give notice of the assessments within sixty days after making the assessment. Plaintiffs assert that neither of them ever received any Notices of Assessment.

The Certificates of Assessment indicate that the I.R.S. sent four separate Notices and Demand letters to plaintiffs. In the absence of evidence to the contrary, this is sufficient to establish that the I.R.S. properly sent the notices to plaintiffs. United States v. Zolla, 724 F.2d 808, 810 (9th Cir., 1984) cert. denied, 469 U.S. 830 (1984).

Plaintiffs have not presented evidence indicating that the I.R.S. did not mail them the appropriate notices. Rather, they contend that they did not receive those notices of deficiency. However, "[t]he notice is valid even if not received by the taxpayer, if it is mailed to the taxpayer's last known address." Id.; See also, Bliss v. United States, 1992 WL 360536, at *3 (E.D. Wash. 1992) ("plaintiffs' contention that the notice was never received is no sufficient to rebut the presumption of validity"). According to the computer records, the written notices were in fact sent to the plaintiffs' last known address. Thus, this claim must also fail.

III. CONCLUSION

Viewing the evidence and all inferences arising therefrom in favor of the plaintiffs, the court concludes that there are no genuine issues of material fact in dispute. Defendant has presented suffcient evidence show that the notices of assessment and demands for

payment were properly executed and sent to plaintiffs. Therefore, the lien placed on plaintiffs' property by the United States is valid and proper.

IT IS ORDERED granting the United States' Motion for Summary Judgment (doc. # 15)

IT IS FURTHER ORDERED denying plaintiffs mOtion to Strike Second Declaration of Eric M. Casper (doc. # 25).

IT IS FURTHER ORDERED denying plaintiffs' Motion to Continue Consideration of Defendant's Motion for Summary Judgment (doc. # 28)

IT IS FURTHER ORDERDED denying plaintiffs' Second Motion to Continue Consideration of Defendant's Motion for Summary Judgment. (doc. # 43)

IT IS FURTHER ORDERED vacating as moot the United States' Motion for a Protective Order (doc. # 51).

IT IS FINALLY ORDERED directing the clerk of the court to enter judgment for the defendant and dismiss this action.

DATED this 12th day of January, 1994.

/s/ Robert C. Broomfield
Robert C. Broomfield
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Filed Jan 13, 1994

JOSEPH G. STEPARD MALANIA M. STEPARD	)
Plaintiffs,	) No. CIV 93-0060 PHX RCB
v.	)
UNITED STATES OF AMERICA	) JUDGMENT IN A) CIVIL CASE
Defendant	)

[ ] **Jury Verdict**. This action cam before the Court for a trial by jury. the issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. this action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that having this Court granted defendants' motion for summary judgment; plaintiffs take nothing. This complaint and action are hereby dismissed.

January 13, 1994
Date

Ricard H. Weare
Clerk

/s/ illegible
(By) Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOSEPH G. STEPARD MALANIA M. STEPARD	)
Plaintiffs,	) No. CIV 93-0060 PHX RCB
v.	)
UNITED STATES OF AMERICA	)SUBSTITUTE AFFIDAVIT)OF JOSEPH G. STEPARD
Defendant	)

COUNTY OF YAVAPAI)
) ss
STATE OF ARIZONA)

I, Joseph G. Stepard, being first duly sworn upon my oath, do state as follows:

1. That I am a Plaintiff in the above captioned action.
2. My wife and I are unable to present affidavits in opposition to the Defendant's Motion for Summary Judgment on the following issues: (1) whether the Defendant determined deficiencies before issuing the Notices of Deficiency to us; (2) whether the Defendant recorded the assessments against us; (3) whether the Defendant gave the Notices of Assessment as required by Internal Revenue Code (IRC), §6303(a).
3. I have begun discovery with requests for admissions and interrogatories and will make requests for production of documents, more interrogatories and if necessary depositions.

4. I attempted to obtain most of the information regarding the summary record of assessments, the Notices of Assessment and Notices of Intent to Levy through the use of the Freedom of Information Act, the Privacy Act and IRC, §6203, but the Defendant was not forthcoming with the documents.
5. The facts and evidence material to the claims are known only to IRS officials with the National Computing Center in Martinsburg, West Virginia, the Ogden Service Center and the Phoenix District offices; such as the record of assessments allegedly made against my wife and I, including the summary record of assessments and the support documents which identify us, the character of the liability assessment, the date of the assessment and the amount of the assessment will be within the custody of the Secretary of the Treasury or his delegate (which is believed to be in the Ogden Service Center).
6. I desire to obtain the discovery of the Chief, Examination Branch and the Chief, Accounting Branch with the Ogden Service Center and the Phoenix District Office, the Phoenix District Director and Ogden Service Center Director, and an Official of the Martinsburg Computing Center including the custodian of the Individual Master Files.
7. These individuals will be able to identify the assessment procedures and records relating to Joseph G. Stepard and Malania Stepard and identify the assessment process pursuant to IRC, §6203 and 26 CFR, §301.6203-1 and the notice process pursuant to IRC, §§6212, 6213, 6303(a) and 6331.
8. The discovery will show the following facts: (1) that the Defendant did not determine deficiencies prior to issuing Notices of Deficiency; (2) that the Defendant did not record the assessment against me; (3) that the Defendant did not give the Notice of Assessment

as required by IRC, §6303(a).

9. There is the material fact in dispute as to whether or not an assessment exists. Certificates of Assessments and Payments, Form 4340, which the Defendant is using in support of its Motion for Summary Judgment, are essentially hearsay. They were prepared by a computer operator looking at a screen and transferring numbers from the computer screen to the form. Neither the individual who transferred the numbers to the form, nor the person certifying the form, nor government's Counsel have actual knowledge that the assessments exist, or that the notices were given. Additionally the documents were prepared after this litigation was begun and the records were not prepared in the normal course of business of the IRS.
10. My labor is my property. I believe the IRS liens at issue in this action may attach to my person as well as personal or real property that the Defendant claims I own.
11. On January 8, 1993, the Defendant was served with our Requests for Admissions and Interrogatories. (See Exhibits A and B attached to Plaintiffs' Reply in Support of Motion to Strike Defendant's Motion for Protective Order). On February 19, 1993 the Defendant filed its Motion for Protective Order. On April 8, 1993, the Defendant filed a Motion for Summary Judgment addressing those issues which are the subject of the our current discovery.
12. I have reviewed the manual sections provided in respect to the use of the Form 4340. I have reviewed the decisions in UNITED STATES v. DIXON, 672 F.Supp. 503, aff'd 849 F.2d 1478 UNITED STATES v. BUFORD, 889 F.2d 1406 (5th Cir., 1989), (Exhibits 1 and 2). I have examined the forms 4340 provided by the Defendant with their April 8, 1993 Motion, that

were attached to the objectionable declaration of Eric M. Casper, and note they are documents prepared only after this litigation began. I have reviewed the decision in UNITED STATES v. HESSE, 90-1 U.S.T.C. 50049 (Exhibit 3), where the court discussed the importance of producing primary evidence and the foundation necessary for the admission of secondary evidence. I have noted that both DIXON, BUFORD and HESSE, supra, have all declared the Forms 4340 are secondary evidence.

13. I have reviewed the Plaintiffs' Request for Admissions Under Rule 36, Federal Rules of Civil Procedure, in the case SIMPSON v. UNITED STATES, Civil No. 90-30021-WEA, and the Defendant's Response to the Request for Admissions (Exhibit 4). The Defendant admitted in the response that the information to prepare the Form 4340 was taken from the Integrated Data Retrieval System (IDRS), the IRS computer.
14. On or about October 15, 1992, I, Joseph G. Stepard, received copies of my Individual Master Files "specific" transcripts (IMF) from the Ogden Service Center (Exhibit 5). On or about November 12, 1992 my wife received her IMF's from the Ogden Service Center (Exhibit 6). I have reviewed these documents and determined the IMF allegedly reflects the following assessment dates for me: for the year 1981 - 07-22-85; for the year 1982 - 07-15-85; for the years 1984 and 1985 - 10-3-88. The IMF for my wife allegedly reflects the assessment date of 09-28-92 for the years 1981, 1982, 1984 and 1985.
15. The March 9, 1993 Certificates proffered by the Defendant reflect substantially the same dates for each of the years for both my wife and myself.
16. The IMF reflects that the Notices of Assessment for the 1981 assessment were allegedly sent to me 07-22-

85; for the 1982 assessment the Notice was allegedly sent on 07-15-85; for the 1984 and 1985 assessment, the Notices were allegedly sent on 10-03-88. The IMF for my wife reflects that the Notices for the 1981, 1982, 1984 and 1985 assessments were allegedly sent on September 28, 1992. The date the Notices of Assessment were allegedly sent is reflected by the MF Stat 21 Code at the end of the IMF. The date each of the Notices of Assessment were allegedly sent to my wife and me are the same date as the assessments that were allegedly recorded against each of us. Neither my wife nor I received an Notices of Assessment.

17. The Certificates proffered by the government claim that the Notices of Assessment were allegedly sent the dates noted in ¶ 16 above. This is referenced by the Notice of Balance Due statement in the Certificates for each of the years.

18. As of March 9, 1993, my wife's and my IMF, contain more information than is found in the Certificates. There are other transactions posted to the IMF which were not transcribed to the Certificates. Despite the fact that Michael S. Bigelow certified that they reflected a true and complete transcript, as of March 9, 1993 my IMF reflects the following disparity in number of transactions reflected when compared with the number of transactions on the Form 4340.

JOSEPH STEPARD

YEAR	IMF	4340
1981	77	47
1982	47	24
1984	58	34
1985	52	31

MALANIA STEPARD

YEAR	IMF	4340
1981	16	15
1982	16	13
1984	16	14
1985	16	14

19. I have compared the number and dates of assessment between the IMF's sent to me and my wife and the Certificates, and the IMF's contain dates not reflected in the Certificates.
20. Contained in both the Certificates and the IMF are Document Locator Numbers (DLN's). In the 14 digit number is a control date. The date is found by counting to the 6th, 7th and 8th digits. If the number is over 400 it was posted by the computer, if under 400 done manually. If the number is over 400 you must subtract 400 from number to arrive at the julian date. (Exhibit 7).
21. These DLN's are assigned to supporting documents for computer entries made by terminal operators at the IRS. My wife and I would seek through discovery to have the supporting documentation for the computer entries in order to challenge the accuracy of the Forms 4340.
22. For example: the DLN related to the July 22, 1985 assessment for the year 1981 is 29247-582-90220-5 (See IMF); the Julian date is 582, or the One hundred and eighty second day of the year, which is July 1, 1985. This DLN on the master file also has a cycle date of 8528. The cycle date is the week when the transaction posts to the computer in Martinsburg, West Virginia. Week 8528 is the week beginning Monday July 8, 1985 and ending Friday July 12, 1987. (Exhibit 8).

23. In Martinsburg the National Computer Center (NCC) picks up the TC 300, and creates a magnetic tape extract to be returned to the Service Center. This extract may or may not have been placed on the Revenue Accounting Control System (RACS) to be assessed. It is the RACS which generates the Form 23C or RACS 006. The IMF merely reflects that the Defendant anticipates that the data may have been returned to the Service Center from Martinsburg, West Virginia by the July 22, 1985 date.
24. The IMF is not used to record or journalize the assessment after the Summary Record of Assessment is signed by the Assessment Officer. The assessment date, as well as the Notice dates are usually and customarily placed into the computer anywhere from 10 days to 2 weeks prior to the assessment actually taking place. See Exhibit 4, in SIMPSON, supra, where the Government admits that the 23C date, which is the alleged assessment date, is forecast as the Monday of the 2nd week following the week in which these transactions are processed at the NCC. See Also (Exhibits 9 and 10)
25. I have followed the recent news and government reports on the over assessment of IRS's accounts receivable. Exhibit 11 is a copy of the Statement of Jennie S. Stathis, Director, Tax Policy and Administration Issues, General Government Division, given to the Oversight Subcommittee, Committee on Ways and Means, House of Representatives, GAO/T-GGD-90-19.
26. In the statement, the computer problems of the IRS relating to the ability to account for that which is and is not assessed is well established. My wife and I are entitled to discover into the accuracy of the computer system and to determine if we are the victims of accounting problems. (Exhibit 12)

27. I have reviewed the GAO Report on the IRS Service Centers in Austin, Texas and Fresno, California, GAO/GGD-85-89, September 30, 1985. The report cites numerous difficulties in balancing the general and subsidiary ledgers due to returns processing problems and the introduction of RACS. Pg. 18. (Exhibit 12). "Problems were encountered in balancing the general ledger because the audit trail under RACS is significantly different than under the old manual general ledger systems. According to a Fresno official, prior to RACS each journal entry was supported by a document which the staff could use to balance the general ledger with the subsidiary ledgers."
28. Due to the use of computers which do not directly communicate with each other, IDRS and RACS, the necessity to transport tapes between the Service Center and the National Computing Center in Martinsburg, West Virginia; the fact that NCC must transcribe and translate data contained on service center tapes into extracts to be returned on tape to the Service Center and the forecasting of the assessment date to the RACS Computer, the system is ripe for errors. In the GAO report identified above at pg. 46: "In 1984 the notice review unit, which reviews the math error notices would get the printed notices on monday; this year it got the notices on Tuesday. This creates a problem because the notices must be mailed by Friday so that the taxpayer will receive them by the following Monday, which is the assessment date on the notices."
29. Since the Notice and assessment date are usually the same, the government admits that the Notices are being sent out before the Record of Assessment is signed by the assessment officer.
30. Attached here as Exhibit 13 is an Affidavit of Philip

L. Haggard. This Affidavit and the Exhibits attached thereto show that assessments for the years 1988 and 1989 were allegedly made against him on August 10, 1992. The Notice of Assessment is also dated August 10, 1992. As the Affidavit and the Notarized Statement on the back of the Assessment Notice show Mr. Haggard received his notice on August 8, 1992.

31. Attached hereto as Exhibit 14 is an Affidavit of Sharon L. Haggard. This Affidavit also shows that the same circumstances occurred for the assessments for 1985 and 1989.
32. Attached hereto as Exhibit 15 is an Affidavit of Randal W. Howard. On August 10, 1992, he was also allegedly assessed and given notice of the assessment for the year 1989. Like the Haggards he also received the Notice on August 8, 1992.
33. As Mr. Howard's Affidavit also shows he received a copy of his IMF "specific transcripts" for the years 1983 and 1984. The date of the transcripts is May 17, 1990. The transcripts already reflect a Transaction Code (TC) 300 date May 28, 1990. For the years 1983 and 1984, Mr. Howard indicates that he was allegedly assessed on May 10, 1990. Yet the May 10, 1990 assessment date is not reflected on this transcript.
34. Attached hereto as Exhibit 16 is an Affidavit of Ross W. Bruner. On August 10, 1992, he was also allegedly assessed and given notice of the assessment for the year 1989. Like the Haggards and Mr. Howard he also received the Notice on August 8, 1992.
35. Attached hereto as Exhibit 17 is the Affidavit of Howard E. Forman. On January 18, 1993 both he and his wife were also allegedly assessed for the years 1985 through 1989. January 18, 1993 was a

federal Monday holiday, there was no regular mail delivery. Mr. Howard picked his wife's notices up on January 16, 1993. He picked his notices up on the morning of January 18, 1993.

36. It is clear from these five (5) people that the Defendant has been projecting what it believes should happen, with respect to the assessments and the Notices, by entering transactions into the computer before the event actually occurs. Because the assessment dates at issue were forecast, I am entitled to discover whether the assessments were properly recorded.
37. In a May 15, 1989 deposition in CHANDLER v. UNITED STATES OF AMERICA, the following statement was made upon the questioning of Ms. Keesler at Page 24: "Q - What kinds of taxes or types of taxes do you assess? A - I don't assess taxes. Q - When you were in the service center did you ever assess a tax? A -Not myself personally, no." (Exhibit 18).
38. Ms. Keesler was an assessment officer in the Ogden Service Center, which is where the assessments are allegedly recorded against me. She was there at the time I was alleged assessed for some of these years.
39. In the GAO 1989 Annual Report on GAO's Tax-Related Work dated March 1990, GAO/GGE-90-46, at page 13, there is a discussion related to computer implementation problems. The report notes that the Martinsburg, West Virginia Computing Center had identified about 900 software errors in the system; that the IRS has not formally accepted the computer system as of January 1989 because the contractor had not delivered acceptable documentation describing how the system's software worked; that in November 1987 systems were installed in all 10 Service Centers despite the problems. (Exhibit 19).

40. I have also received a copy of an April 12, 1990 IRS Memoranda dated, regarding a crisis program called the Form 23C Recovery Project. This project identified and corrected system wide problems related to improperly prepared and executed Forms 23C, Summary Record of Assessment. Without discovery I will not be able to determine if a valid assessment has been done against myself and my wife. (Exhibit 20).
41. The regulation at 301.6203-1 states: "The district director and the director of the regional service center shall appoint one or more assessment officer. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment." Due to Ms. Keesler's comment in the deposition there is serious questions concerning the signing of any record of assessment.

FURTHER AFFIANT SAITH NOT

EXECUTED this 19th day of May, 1993.

/s/ Joseph G. Stepard
JOSEPH G. STEPARD

Before me appeared, Joseph G. Stepard, this 19th day of May, 1993.

/s/ Patricia A. McNiff
NOTARY PUBLIC

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOSEPH G. STEPARD MALANIA M. STEPARD	)
Plaintiffs,	) No. CIV 93-0060 PHX RCB
v.	)
UNITED STATES OF AMERICA	) SECOND AFFIDAVIT OF) JOSEPH G. STEPARD
Defendant	)

COUNTY OF MARICOPA)
) ss
STATE OF ARIZONA)

I, Joseph G. Stepard, being first duly sworn upon my oath, do state as follows:

1. That I am a Plaintiff in the above captioned action.
2. My wife and I are still unable present affidavits in opposition to the Defendant's Motion for Summary Judgment on the following issues: (1) whether the Defendant recorded the assessments against us; (2) whether the Defendant gave the Notices of Assessment as required by Internal Revenue Code (IRC), §6303(a).
3. Some of the answers to Requests for Admissions appear to be in conflict with other evidence attached to the previous Affidavit of Joseph G. Stepard and the official manual used by the Defendant to translate the Individual Master File (IMF).
4. In Request for Admissions 24, 47, 70 and 93, the Defendant answered the Request with the

qualification that "The transaction would appear as a pending transaction, with no date, until the date of assessment. The Requests for Admissions are attached as Exhibit 1 to this Affidavit.

5. Attached as Exhibit 2 is the IDRS ON-LINE INPUT Table found on Page 14-12 (Chapter 14, Page 12) of the 1988 ADP and IDRS INFORMATION MANUAL, Document 6209.
6. This Table applies to transactions posted to the Individual Master File for the year 1988. During the year 1988, I was allegedly assessed taxes on October 3, 1988 for both the years 1984 and 1985. (See Exhibit 1, Request Number 49).
7. The cycle week for these two assessments is 8838 which is the week beginning Sunday September 18, 1988 and ending Saturday September 28, 1988. (See Exhibit 1, Request Numbers 51 through 54, inclusive).
8. According to the IDRS ON-LINE INPUT Table (Exhibit 2) the "Output Cycle Number" 8838 (Column 4) shows that the "Assessment or Schedule Date (23C)" (Column 3) is October 3, 1988, which happens to be the date the Defendant alleges I was assessed for the years 1984 and 1985.
9. Furthermore, the "Posted Transactions Appears on IDRS" (Exhibit 2, Column 2) is September 26, 1988.
10. Attached as Exhibits 3 and 4 are Individual Master File (IMF) specific transcripts for Randal W. Howard for the years 1983 and 1984. These two transcripts were previously attached to the Affidavit of Randal W. Howard which was attached as Exhibit 15 of the previous Affidavit of Joseph G. Stepard.
11. The transcripts for both years were printed out on May 17, 1990. Both transcripts already show a Transaction Code (TC) of 300 dated May 28, 1990. The Defendant admitted that the TC 300 code is the

Code used for the '23C' date that appears on the Forms 4340 that were submitted in support of the Defendant's Motion for Summary Judgment. (See Exhibit 1, Request 98).

12. The Form 4340 is prepared exclusively from the my wife's and my IMF. (See Exhibit 1, Request 96).
13. The other conflict arises from the dates that the Defendant says the Notices of Assessment, required to be given under the provisions of IRC, §6303(a), were sent to my wife and I. The Defendant states that the Notices of Assessment are generated on the date of the assessment. (See Exhibit 1, Requests 19, 44, 66 and 89). As Paragraphs 14 through 25 of this Affidavit set out there is sufficient evidence to indicate that the Notices were sent out before the assessment ever occurred.
14. Attached as Exhibits 5, 6 and 7 are Notices that were received by Mr. Philip L. Haggard. The dates of these Notices are August 10, 1992 (Exhibits 5 and 6) and September 7, 1992 (Exhibit 7), respectively. These are Notices for assessments alleged to have been made for the years 1988, 1989 and 1988, respectively. These Notices were attached as Exhibits to the Affidavit of Philip L. Haggard which was attached as Exhibit 13 to the previous affidavit of Joseph G. Stepard. The Affidavit of Philip L. Haggard is incorporated herein by this reference.
15. As the Affidavit of Philip L. Haggard also shows he was allegedly assessed on the same date the Notices. However, as Mr. Haggard also states he received those notices (Exhibits 5, 6, and 7 of this Affidavit) on Saturday, August 8, 1992 and, Saturday, September 5, 1992, respectively.
16. Attached as Exhibits 8, 9 and 10 are Notices that were received by Mrs. Sharon J. Haggard. The dates of these Notices are August 10, 1992 (Exhibits 8 and

9) and September 7, 1992 (Exhibit 10), respectively. These are Notices for assessments alleged to have been made for the years 1985, 1988 and 1988, respectively. These Notices were attached as Exhibits to the Affidavit of Sharon J. Haggard which was attached as Exhibit 14 to the previous affidavit of Joseph G. Stepard. The Affidavit of Sharon J. Haggard is incorporated herein by this reference.

17. As the Affidavit of Sharon J. Haggard also shows she was allegedly assessed on the same date the Notices. However, as Mrs. Haggard also states she received those notices (Exhibits 8, 9, and 10 of this Affidavit) on Saturday, August 8, 1992 and, Saturday, September 5, 1992, respectively.
18. Attached as Exhibit 11 is a Notice that was received by Mr. Randal W. Howard. The date of this Notice is August 10, 1992. This is a Notice for an assessment alleged to have been made for the year 1989. This Notice was attached as an Exhibit to the Affidavit of Randal W. Howard which was attached as Exhibit 15 to the previous affidavit of Joseph G. Stepard. The Affidavit of Randal W. Howard is incorporated herein by this reference.
19. As the Affidavit of Randal W. Howard also shows he was allegedly assessed on the same date the Notice. However, as Mr. Howard also states he received the notice on Saturday, August 8, 1992.
20. Attached as Exhibit 12 is a Notice that was received by Mr. Ross W. Bruner. The date of this Notice is August 10, 1992. This is a Notice for an assessment alleged to have been made for the year 1989. This Notice was attached as an Exhibit to the Affidavit of Ross W. Bruner which was attached as Exhibit 16 to the previous affidavit of Joseph G. Stepard. The Affidavit of Ross W. Bruner is incorporated herein by this reference.

21. As the Affidavit of Ross W. Bruner also shows he was allegedly assessed on the same date the Notice. However, as Mr. Bruner also states he received the notice on Saturday, August 8, 1992.
22. Attached as Exhibit 13 are five (5) Notices that were received by Mrs. Maria D. Forman. The date of all of these Notices is January 18, 1993. These are Notices for assessments alleged to have been made for the years 1985, 1986, 1987, 1988 and 1989. These Notices were attached as Exhibits to the Affidavit of Howard E. Forman, which was attached as Exhibit 17 to the previous affidavit of Joseph G. Stepard. The Affidavit of Howard E. Forman is incorporated herein by this reference.
23. As the Affidavit of Howard E. Forman also shows his wife was allegedly assessed on the same date the Notices. However, as Mr. Forman also states the Notices addressed to his wife were received on Saturday, January 16, 1993.
24. Attached as Exhibit 14 are five (5) Notices that were received by Mr. Howard E. Forman. The date of all of these Notices is January 18, 1993. These are Notices for assessments alleged to have been made for the years 1985, 1986, 1987, 1988 and 1989. These Notices were attached as Exhibits to the Affidavit of Howard E. Forman, which was attached as Exhibit 17 to the previous affidavit of Joseph G. Stepard. The Affidavit of Howard E. Forman is incorporated herein by this reference.
25. As the Affidavit of Howard E. Forman also shows he was allegedly assessed on the same date the Notices. However, as Mr. Forman also states he received the Notices on Saturday, January 16, 1993.
26. While it appears the Notices may be "dated" for the alleged date of assessment, it is clear that they are generated before the date of assessment.

27. The Defendant's response to Requests 19, 44, 66 and 89 stating that the Notices were generated has been satisfactorily rebutted to the extent that more discovery is warranted in this area. My wife and I have served additional discovery that will determine whether the Notices of Assessment, if they were sent, were sent in advance of the assessments.

FURTHER AFFIANT SAITH NOT

EXECUTED this 19th day of August, 1993.

/s/ Joseph G. Stepard
JOSEPH G. STEPARD

Before me appeared, Joseph G. Stepard, this 19th day of August, 1993.

/s/ Mary D. Estrella
NOTARY PUBLIC
My commission expires
March 15, 1995

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JOSEPH G. STEPARD MALANIA M. STEPARD	))
	)No. CIV 93-0060 PHX RCB
Plaintiffs,	))
v.	)UNITED STATES')RESPONSE TO
UNITED STATES OF AMERICA	)PLAINTIFFS' FIRST SET)RESQUESTS FOR)ADMISSIONS
Defendant	)

REQUEST FOR ADMISSION NO. 96.

If the Defendant intends to use the Form 4340, Certificates of Assessment and Payments, as evidence to establish that the assessments were made and the notices were sent, the entries for the Form will be taken exclusively from the Plaintiff's Individual Master File (IMF) for each year of the assessment and notice in question.

Admit [X]
Denied [ ]
Qualified [ ]

REQUEST FOR ADMISSION NO. 97.

The Official Custodian of the Individual Master File is the Director of the Martinsburg Computer Center in Martinsburg, West Virginia.

Admit [X]
Denied [ ]
Qualified [ ]

REQUEST FOR ADMISSION NO. 104.

The Plaintiffs' IMF's are ADP information contained within the Integrated Data Retrieval System (IDRS).

Admit [X]
Denied [ ]
Qualified [ ]

The above Requests for Admission must be responded to within 45 days or each of the above statements and the genuineness of the above documents shall be deemed admitted unless appropriate action is taken within the time prescribed by rule or order.

DATED: 1-8-93

/s/ Joseph G. Stepard
JOSEPH G. STEPARD

/s/ Malania M. Stepard
MALANIA M. STEPARD

c/o P.O. Box 3314
West Sedona, Arizona 86340
(602) 282-3296
Plaintiffs, In Pro Per

VERFICATION

Pursuant to 28 U.S.C. Section 1746, I declare under penalties of perjury that the foregoing responses are true and correct to the best of my knowledge.

Dated this 27th day of July, 1993

/s/ Eric M. Casper
ERIC M. CASPER
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-3448

Certificate of Assessments and Payments

Name	Address	EIN or SSN
Joseph G. Stepard	Box 3314 West Sedona, Arizona	040-24-7961

Date	Explanation of Transactions	Assessment (abatement)	Credit (Credit Reversal)
(a)	(b)	(c)	(d)
	adjusted gross income 33,185.00		
	taxable income 34,475		
6-29-84	No liability return filed	.00	.00
9-15-83	TDI Delayed		
	neg. penalty	1,844. 22	
	est. tax penaly	154.98	
	late filing penalty	2,105.62	
4-15-83	Withholding & excess fica		5,249.00

(Note: Columns e, f, g, and h are continued on next page; and remaning transactions on next six pages)

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
			8212
	29211-182-85298-84	08-20-84	
	29278-258-98000-83		
	29247-572-00027-85	7-15-85	
		7-15-85	
		7-15-85	

Certificate of Assessments and Payments

Name	Address	EIN or SSN
Joseph G. Stepard	P.O. Box 3314 West Sedona, Arizona	040-24-7961

Date (a)	Explanation of Transactions (b)	Assessment (abatement) (c)	Credit (Credit Reversal) (d)
	Audit deficiency	28,699.50	
	Interest on deficiency	7,938.41	
	Fees and collection costs	6.00	
	Fees and collection costs	6.00	
	Fees and collection costs	6.00	
12-13-91	Assessment satute extended to 08-20-87		222.24
7-15-85	Negligence penalty abated	(3190.00)	
	negligence penalty	3,190.00	

(Note: Columns e, f, g, and h to these transactions are continued on next page;)

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
		7-15-85	8212 cont.
		7-15-85	
	86218-601-00854-88	08-08-88	
	86-218-624-00912-91	09-02-91	
	86218-624-00915-91	09-02-91	
	86277-347-77500-91		
	29247-648-90054-92		
	29247-572-00027-85	7-15-85	

Certificate of Assessments and Payments

Name	Address	EIN or SSN
Joseph G. Stepard	P.O. Box 3314 West Sedona, Arizona	040-24-7961

Date (a)	Explanation of Transactions (b)	Assessment (abatement) (c)	Credit (Credit Reversal) (d)
7-15-85	late filing penalty abate	(3,757.00)	
	late filing penalty	3,757.00	
4-15-83	withholding & excess fica reversed		(2,624.00)
9-28-92	tax abated	(17,655.00)	
	fees and collection costs	6.00	
7-15-85	Notice of balance due	212.15	
5-02-88	forth notice of balance due		
6-06-88	ref. to D.O. for collection		101.89
Ballance			

(Note: Colums e, f, g, and h for these transactions are continued on next page;)

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
	29247-648-90054-92		8212 cont.
	29247-572-00027-85	07-15-85	
	29247-648-90054-92		
	86218-427-02100-93	02-15-93	

20,486.73

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, penalties, interests, abatements, credits, refunds and and advance or unidentified payments relating thereto is disclosed by the records of this office as of the date of this certification are shown therein.

Signature	Location	Date
/s/ Michael S. Bigelow	Internal Revenue Service Center, Ogden, Utah	03-09-93

APPENDIX B
WILDE

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APPENDIX B

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUGUST 22, 1995

JOHN WILDE, as personal representative of the estate of ARTHUR F. SHERRELL CECILIA SHERREL,	)	No. 93-15538
Plaintiffs-Appellants,	)	D.C.No. CV-89-0619 HDM (LRL)
v.	)	
UNITED STATES OF AMERICA	)	MEMORANDUM***
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted June 26, 1995****

Before: ALARCON, FERNANDEZ, and RYMER, Circuit Judges.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

John Wilde, as representative of the estate of taxpayer Arthur Sherrell, and Cecillia Sherrell, Arthur Sherrell's wife, (collectively "appellants") appeal pro se the district court's summary judgment on remand from this court in favor of the United States. Appellants challenge the validity of tax liens placed on Arthur Sherrell's property by the Internal Revenue Service ("IRS") for liabilities for tax years 1982 and 1983. Appellants also appeal the district court's denial of their motion for a continuance pursuant to Fed. R. Civ. P. 56(f), and the denial of their motion to file an amended complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Summary Judgment

A. Quiet Title.

Appellants conted that the district court erred by granting summary judgment for the United States on their quiret title claim because the IRS (1) failed to assess their tax in accordance with section 6203; (2) failed to send them notice and demand for payment in accordance with section 6303; and, (3) failed to send them notice of intent to levy in accordance with section 6331.

We review de novo the district court's grant of summary judgment. Huff v. United States, 10 F.3d 1440, 1443 (9th Cir.) Cert. denied, 114 S.Ct. 2706 (1994).

Section 2410 provides that "the United States may be named a party in any civil action or suit in any district court ... to quite title to ... real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a). A section 2410 action will be "jurisdictionally barred if, at the time it is commenced, the government claims a title interest rather than a lien interest." Hughes v. United States, 953 F.2d 531, 538 (9th Cir., 1992). No quite title action will lie "as

to amounts that have already come into the hands of the IRS." Farr v. United States, 990 F.2d 451, 453 (9th Cir.,)

Here, to the extent that the govern has title to Arthur Sherrell's wages and real and personal property, appellants are jurisdictionally barred from bringing an action under section 2410.

Appellant's remaining contentions as to property on which the government may still have a lien lack merit. The government's exhibits included 4340 Forms for both of the years in question, copies of the notice and demand letter, copies of the Final Notice (notice of intention to levy), a copy of the Notice of Seizure, together with the affidavit of Ron Smith, Chief of Special Procedure Function in Las Vegas, Nevada, stating that all required procedures were followed.

The 4340 Forms for both of the taxable years establish that taxes, penalties and interest for 1982 were validly assessed against Arthur Sherrell on November 28, 1988, and that the taxes penalties and interest for 1983 were validly assessed against him on December 26, 1988. See Huff, 10 F.3d at 1445 ("Generally, courts have held that IRS Form 4340 provides at least presumptive eividence that a tax has been validly assessed under section 6203.") Finally, the supporting evidence submitted shows that the government sent Arthur Sherrell a notice of intent to levy for the deficiencies assessed by certified mail in accordance with section 6331.

Thus, there is no support in the record for appellants' contention that the government failed to comply with procedural requirements in recording or notifying appellants of the November 28, 1988 assessment or the December 26, 1989 assessment.[1] Accordingly, the District

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[1] Appellants contend that the district court erred by not considering their procedural challenges to the government's subsequent assessments for tax years 1982, 1984 and 1985. We disagree. The

court properly entered summary judgment for the government on applellant's quiet title claim.

II

Wrongful Disclosure Claim

Appellants contend that the district court erred by granting summary judgment on appellants' wrongful disclosure claim. This contention lacks merit.

Section 6103 provides that income tax returns and return information are confidential. 26 I.R.C. § 6103; Maisano v. United States, 908 F.2d 408, 410 (9th Cir., 1990). Section 7431 provides a taxpayer a civil cause of action for damages for the intentional or negligent disclosure of confidential return information by officers or employees of the United States. 26 I.R.C. § 7431(a); Maisano, 908 F.2d at 410. Section 6103, however, authorizes the IRS to disclose return information if necessary for the collection of a tax liability. 26 I.R.C. § 6103(k)(6); Maisano, 908 F.2d at 410.

Here, the disclosures of which appellants complain occurred during the proper collection of Arthur Sherrell's tax liabilities for tax years 1982 and 1983. Accordingly, the distict court properly granted summary judgment for the government on appellant's wrongful disclosure claim.

III

Discovery

Appellants contend that the district court erred by granting summary judgment without allowing them

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district court entered summary judgment on the section 2410 claim asserted in the appellant's original complaint. That complaint only raised issues as to the November 28, 1988 assessment and the December 26, 1989 assessment. Although appellants attempted to add addition years and assessments in their first, second and third amended complaints, we do not consider those complaints for purposes of reviewing the propriety of the section 2410 dismissal.

additional time to conduct further discovery. This contention lacks merit.

IV

Amended Complaints

Finally, appellants contend that the district court erred by not considering the additional claims in their first amended complaint and by denying their motion to file a third amended complaint. These contentions lack merit.

We review for abuse of discretion a district court's decison on whether to permit amendment. See National Abortions Fed'n v. Operation Rescue, 8 F.3d 680, 681 (9th Cir., 1993)

A. First Amended Complaint

Appellants contend that the district court erred by not considering issues raised in their first amended complaint regarding the government's alleged wrongful disclosures for tax years 1984 and 1985 and for a second 1982 assessment. We disagree.

Although in ruling on the wrongful disclosure claim, the district court condiered appellant's first amended complaint, we see no abuse of discretion in the district court's refusal to conside the new claims and additional tax years included in that complaint. The district court had given appellants specific directions on how to amend their original complaint to state a claim for wrongful disclosure. These directions did not give appellants permission to amend their complaint with new cause of action and additional claims included in the amended complaint, filed almost one year after appellants instituted their action. cf. McGlinchy v. Shell Chemical Co., 845 f.2d 802, 809-10 (9th Cir., 1988) (holding that no abuse of discretion to deny leave to amend where amendment would have added new issues and would require additional discovery and briefing.

B. Third Amended Complaint.

In their third amend complaint, it appears that appellants attempted to include additional challenges to the government's assessments for tax years 1984 through 1988. Because discovery was already completed by this time, and because the district court already had entered summary judgment as to one of appellants' original claims, we find no abuse of discetion in the district court's denial of appellants' motion for leave to file a third amended complaint. See id.

AFFIRMED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED DECEMBER 6, 1995

JOHN WILDE, as personal representative of the estate of ARTHUR F. SHERRELL CECILIA SHERREL,	) No. 93-15538
Plaintiffs-Appellants,	) D.C.No. CV-89-0619 HDM (LRL)
v.	
UNITED STATES OF AMERICA	) O R D E R
Defendant-Appellee.	

Before: ALARCON, FERNANDEZ, and RYMER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Filed Feb 17, 1993

ARTHUR F. SHERRELL ET. AL.	)
Plaintiffs,	) No. CV-S-89-619 HDM (LRL)
v.	)
UNITED STATES OF AMERICA	) MINUTES OF COURT) DATED: FEBRUARY 11, 1993
Defendant	)

PRESENT: THE HONORABLE HOWARD D. MCKIBBEN, UNITED STATES DISTRICT JUDGE.

DEPUTY CLERK: ANITA MOORE

RECORDER/TAPE#: SUE DAVY

COUNSEL FOR PLAINTIFF: ARTHUR F. SHERRELL (PRO PER)

COUNSEL FOR DEFENDANT: BRIAN FELDMAN

PROCEEDINGS: HEARING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (#53)

COURT CONVENED: 4:45 P.M.

Attorney Feldman addresses the status of the case and that the matter has gone to the 9th Circuit of Appeal.

Plaintiff addresses the Court and enters an Oral Motion to Continue this Hearing.

Court finds proper notice was given the parties involved.

IT IS ORDERED that Plaintiff's oral motion to continue the hearing. Motion to Recondsider and Motion

for Summary Judgment are DENIED. Defendant's Motion for Summary Judgment is GRANTED.

Court adjourned: 5:05 p.m.

Carol C. Fitzgerald, Clerk
U.S. District Court

By: /s/ Anita Moore
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ARTHUR F. SHERRELL ET. AL.	)
Plaintiffs,	) No. CV-S-89-619 HDM (LRL)
v.	)
UNITED STATES OF AMERICA	) JUDGMENT IN A CIVIL CASE
Defendant	)

[ ] **Jury Verdict**. This action cam before the Court for a trial by jury. the issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. this action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant United States of America's motion for summary judgment is granted.

Entered and Served Feb 17, 1993 Filed Feb 17, 1993

February 17, 1993
Date

Carol C. Fitsgerald
Clerk

/s/ illegible
(By) Deputy Clerk

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JUNE 2, 1992

ARTHUR F. SHERRELL; CECILIA SHERREL,	)
	) No. 91-15979
Plaintiffs-Appellants,	)
v.	) D.C.No. CV-89-0619 HDM (LRL)
UNITED STATES OF AMERICA	) MEMORANDUM*
Defendant-Appellee.	)

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted May 26, 1992**

Before: FARRIS, THOMPSON, and FERNANDEZ, Circuit Judges.

Arthur F. Sherrell and Cecillia Sherrell appeal pro se the district court's dismissal of their action to quiet title under 28 U.S.C. § 2410 and summary judgment in their

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

unlawful disclosure of return information claim. We review de novo, Kruso v. International Tel. & Tel. Corp. 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied 110 S.Ct. 3217 (1990, and reverse and remand.

I

Background

On August 22, 1989, the Sherrelss fied a complaint against the United States to quiet title to property seized by the Internal Revenue Service ("IRS") for unpaid federal tax liabilities and to recover damages for unauthorized disclosure of return information pursuant to 26 U.S.C. §§ 6130, 7431. The IRS filed a motion to dismiss, or in the alternative, motion for summary judgment on December 22, 1989. The IRS attached an affidavit and exhibits support the prcedural validity of the IRS's actions. On June 5, 1990, the district court field an order ("Order I") dismissing Sherrells' quiet title claim because 28 U.S.C. § 2410 did not waive sovereign immunity for claims against the United States brought by the taxpayer liable for the tax. The district court, however, granted the Sherrells an opportunity to amend their complaint so as to plead with specificity their unlawful disclosure claim.

On June 14, 1990, the Sherrells filed a first amend complaint setting forth the same claims. On July 2, 1990, the IRS filed a motion to dismiss. On March 5, 1991, the district court filed an order ("Order II") granting summary judgment in favor of the IRS because the IRS's liens and levies were procedurally valid, and therefore, the disclosures were authorized by 26 U.S.C. § 6103(k)(6).

II

Merits

A. Quiet Title Claim (Order I)

A taxpayer may bring an action to quiet title to

property on which the United States has a lien. 28 U.S.C. § 2410. Subsequent to the district court's Order I, we have interpreted section 2410 as a limited waive of the United States' sovereign immunity in "actions challenging the procedural aspects of tax liens." Arford v. United States, 934 F.2d 229, 232 (9th Cir., 1991) (Section 2410 waives sovereign immunity if taxpayer challenges procedural aspects of assessment or levy). Nevertheless, a taxpayer "may not use a section 2410 action to collaterally attack the merits of an assessment." Elias v. Connett, 908 F.2d 521, 527 (9th Cir., 1990)

Here, the Sherrells challenged the procedural validity of the IRS's assessment and liens in their complaint. Accordingly, section 2410 waives sovereign immunity. See Arford, 934 F.2d at 232-33. Thus, the district court erred by dismissing the Sherrells; quiet title claim based on sovereign immunity, and we remand for further proceedings. See id. at 234.

B. Unlawful Disclosure Claim (Order II)

The Sherrells argue that the district court erred because it failed to give notice that it was converting the IRS's motion to dismiss under Fed. R. Civ. P. 12(b)(6) into one for summary judgment. We have held "that where the nonmoving party is appearing pro se, the notice requirements of Rule 56(c) must be strictly adhered to when a motion to dismiss under Rule 12(b)(6) is converted into one for summary judgment." Garaux v. Pully, 739 F.2d 437, 439-40 (9th Cir., 1984)

Here, the IRS filed a motion to dismiss the Sherrells' first amended complaint on the ground that the unlawful disclosure claim failed to state a claim upon which releif could be granted.[1] The district court, in reaching its

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[1] The IRS's motion was presented along with its opposition to the Sherrells' motion to vacate Order I.

conclusion, relied on matters outside the pleadings to determine that the IRS had complied with its procedures and that the disclosure was appropriate under 26 U.S.C. § 6103(k)(6). Order II ended by stating, "the motion for summary judgment (#33) on behalf of the United States is hereby GRANTED.

The district court erred by treating, sua sponte, the IRS's motion to dismiss for failure to state a claim as a motion for summary judgment without provideing expicit notice ot the Sherrells. See Garaux, 739 F.2d at 440.[2]

REVERSED AND REMANDED

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[2] We note that, as a matter of law, disclosures made to effectuate the liens and levies necessary to collect tax liabilities are not in violation of section 6103. See 26 U.S.C. § 6103(k)(6); Maisano v. United States, 908 F.2d 408, 410 (9th Cir., 1990).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Entered Jun 5, 1990 Received and filed Jun 5, 1990

ARTHUR F. SHERRELL and)
CECILIA SHERRELL)
husband and wife,)
)
Plaintiffs,) No. CV-S-89-619
) HDM (LRL)
v.)
) ORDER
UNITED STATES OF)
AMERICA)
)
Defendant)
)

Plaintiffs Arthur and Cecilia Sherrell (hereinafter "Sherrells") commenced this action to quiet title to certain real property located in the State of Nevada. Sherrells further seek the return of property levied upon and for damages for unlawful disclosure of return and return information. it appears from the record that the property in question was levied upon by the Internal Revenue to satisfy income tax assessments for the years 1982 and 1983. Briefly summarized, the facts show that the Sherrells failed to file income tax returns for the years 1982 and 1983. the Internal Revenue Service then entered tax assessments for the years 1982 and 1983 and sent notice and demand for payment to the Sherrells. The Sherrells failed to pay the assessed tax liabilities, and the United States sent demands for payments as well as notice os intent to levy. The notice of federal tax lein was filed with the Clark County Recorder's Office on April 13, 1989. Subsequently, Sherrells' boat was seized

and sold. Thiw was done pursant to notices of levy and notices of seizure.

In this action, Sherrells seek to quiet title to the seized property and for damages for unlawful disclosure of a return and return information. The United States seeks to dismiss this action contending that the first count is barred by the doctrine of sovereign immunity and that the Plaintiffs's complaint fails to state a claim upon which relief can be granted.

In their complaint, the plaintiffs contend this court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1340, 1361, 2410, and 2463. The United States correctly asserts that sovereign immunity is not waived by general jurisdiction statutes alone. Kester v. Campbell, 652 F.2d 13, 15 (9th Cir., 1981), cert. denied 454 US 1146 (1982).

While 28 U.S.C. § 2410 is a waiver of sovereign immunity for quiet title actions, that statute is designed to provide relief to third parties such as good faith purchasers of real estate and foreclosing mortgages. Plaintiffs have cited no authority for the proposition that this statutory section should be available to the taxpayer liable for the tax. Here, all notices which were required to be sent were sent to the taxpayer. Sherrells may, therefore, have a legal remedy in the form of a refund suit, but are not entitled to redress in the form of a quiet title action. Since a quiet title suit is equitable in nature, and since the taxpayers have a specific remedy in the form of a refund suit, Sherrells have failed to state a claim upon which relief can be granted. United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d at 738 (5th Cir., 1980)

In addition, the Sherrells apparently contend they are not subject to the income tax laws and that their wages and seized property are not subject to levy under 26 U.S.C. § 6331. These arguments are without merit. Clearly, a levy may be made upon accrued salary or

wages or other property of any person liable for unpaid taxes. Sherrells fall in that category and are subject to the income tax laws.

Finally, the Sherrrells contend in count tow of the complaint that they are entitled to damages for unlawful disclosure of return and return information. It is difficult for the court to determine precisely what argument the Sherrells are making in this count of the complaint.

Accordingly, the Sherrells shall have twenty (20) days from the date of this order within which to amend count two of the complaint by setting forth with specificity what return information is being objected to. Should the Sherrells amend the complaint, they should provide the court with sufficient information to determine if the provisions of 26 U.S.C. § 7431 are applicable of if Sherrells have demonstrated that there may be liability on the basis of a disclosure which did not result from a good faith, but erroneous, interpretation of § 6103. Failure to amend the complaint to set forth the alleged disclosures with specificity as order by the court shall result in dismissal of count two. Shoue the Sherrells amend the complaint, the government will have fifteen (15) days from the date of the amendment within which to supplement the motion to dismiss.

On the basis of the foregoing, it is ORDERED that count pme pf tje cp,[;aomt be. and hereby is, DIMISSED. It is further ORDERED that the Plaintiffs shall have twenty (20) days from the date of this order within which to amend count of of the complaint to set froth the allegations with greater specficity in accordance with this order.

DATED this 1st day of June, 1990.

/s/ Howard D. McGibben
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Entered Jun 5, 1990 Received and filed Jun 5, 1990

ARTHUR F. SHERRELL and)
CECILIA SHERRELL)
husband and wife,)
)
Plaintiffs,) No. CV-S-89-619
) HDM (LRL)
v.)
) ORDER
UNITED STATES OF)
AMERICA)
)
Defendant)
)

Defendant, the United States of America, has renewed its motion to dismiss Arthur and Cecilia Sherrells' ("Sherrells") action for damages for wrongful disclosure oftax return information pertaining to Arthur Sherrell's tax liability. This court has previously denied a similar motion without prejudice to allege with greater specificity the facts on which this claim is based. Sherrells have filed an amended complaint, and the United States contends that the amended complaint continues to fail to state grounds upon which relief can be granted.[1] Sherrells have filed a motion to vacate the order of this court dismissing count one of their complaint (quiet title). Sherrells continue to fail to

[1] Only Sherrells' claims relating to unlawful disclosure (counts two through four) are before the court. This court previously granted summary judgment in favor of the United States and against the Sherrells on the quiet title claim.

present any persuasive authority in support of their argument that 28 U.S.C. § 2410 is designed to constitute a waiver of sovereign immunity which entitles a taxpayer to bring a quite title action. Acccordingly, their motion to vacate is DENIED.

The United States argues that all disclosure of tax return information was made pursuant to 26 U.S.C. § 6103(k)(6), which permits disclosure of certain tax return information in attempts to cllect taxes owed. Sherrells concede that all disclosures at issue here were made in attempts by the I.R.S. to collect taxes. Thus, on their face, all disclosures fall within the prtection of 26 U.S.C. § 6103(k)(6).

Sherrells contend that the disclosures are not protected because thc I.R.S. failed to comply with its own procedural requirments in making the underlying tax assessments and levies. Sherrells take the position, that, if the underlying tax assessments are invalid, then any disclosure of tax return information in attempts to collect such tax must also be invalid and unprotected.

26 U.S.C. § 7431 provides a taxpayer civil remedies for unlawful disclosure of tax information. This section provides in pertinent part that a taxpayer may bring a civil action for damages "if any officer or employee of the Untied States knowingly, or by reason of negligence, discloses any . . . return information in violation of any provision of § 6103." However, the section also provides that "no liability shal arise under this section with respect to any disclosure which results from a good faith, but erroneous interpretation of § 6103." Since, the court concludes that I.R.S. complied with the procedural requirements of the Act, it is unnecessary to address the government's good faith argument. Had it been necessary to address the issue, it is clear all the actions of the I.R.S. in this case were undertaken in good faith.

Sherrells allege that "at no time . . . has the [United

States] made a procedurally [sic] valid determination of a deficiency as required by 26 U.S.C. § 6211 et. seq. " 26 U.S.C. § 6201 authorizes the Secretary of Treasury to make "determiantions and assessments of all taxes imposed by this title . . . which have not been duly paid . . . at the time and in the manner provided by law." § 6203 provides that such assessments "shall be made by recording the liability of the taxpayer in the officer of the secretary. . . .Upon request by the taxpayer, the Secretary shall furnish a copy of the record of assessment.

Sherrells apparently contend that the notices of deficiency filed for the years in question were invalid because they did not contain a "properly prepared and signed return or a properly executed and subscribed return." It is true that the notices of deficiency did not include a tax return. However, the Sherrells cite no authority for the proposition that a notice of deficiency is invalid if not accompanied by a properly prepared and signed tax return. The uncontroverted evidence indicates that proper notices of deficiency were sent to Arthur Sherrell's last known address as required by the Internal Revenue Code. 26 U.S.C. § 6212, which deals with notices of deficiency, simply authorizes the Secretary to send notice of the deficiency to the taxpayer. It does not require a signed return. The United States has complied with the requirements of 26 U.S.C. § 6212.

Sherrells also contend that the assessments suffer from procedural defects which render them invalid. Sherrells' complain that the assessments didn not include a summary record of assessment . . . signed by an assessment officer, that, through supporting records identifies the plaintiffs, the character of the tax assessed, the period of the assessment, and the amount assessed." They also claim that they did not receive a notice of assessment and demand for payment. The record simply

does not support these allegations. The record includes the certificate of assessment for 1983, and that certificate provides all required information. While it is true that the certificate does not include "supporting records," there is no statutory requirement that it must. Sherrells' argument that the certificate of assessment was invalid is factually unsupportable. Sherrells allege that they never received a final notice and demand for payment as required by 26 U.S.C. § 6331(d). The record indicates that the United States mailed the required notices of assessment and demands for payment, final notices and notices of intention to levy to Arthur Sherrell's last known address. The United Staes has complied with § 6331(d). Cecilia Sherrell points out that she never received a Notice of Assessment and Demand for Payment from the I.R.S. However, this does not invalidate the assessments. The assessments were made against her husband, Arthur Sherrell, not her. Because she was not liabe for the taxes, she had not statutory right to notice.

Sherrells' other allegations of procedural irregularities are unsupported conclusions. This court concludes that the assessments made by the I.R.S. comported with all statutory procedural requirements and are valid and enforceable. Therefore, disclosure of Arthur Sherrell's return information in efforts to collect the taxes identified in the assessments here was authorized by 26 U.S.C. § 6103(k)(6) and cannot, as a matter of law, give rise to damges liability. Accordingly, the motion for summary judgment (#33) on behalf of the United States is hereby GRANTED.

It is so ORDERED

DATED this 4th day of March, 1991.

/s/ Howard D. McGibben
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ARTHUR F. SHERRELL ET. AL.	)
Plaintiffs,	) No. CV-S-89-619 HDM (LRL)
v.	)
UNITED STATES OF AMERICA	) JUDGMENT IN A) CIVIL CASE
Defendant	)

[ ] **Jury Verdict**. This action cam before the Court for a trial by jury. the issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants motion for summary judgment has been granted.

Entered Mar 05, 1991 Filed Mar 05, 1991

March 17, 1993
Date

Carol C. Fitsgerald
Clerk

/s/ illegible
(By) Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ARTHUR F. SHERRELL ET. AL.	)
Plaintiffs,	) No. CV-S-89-619 HDM (LRL)
v.	)
UNITED STATES OF AMERICA	)AFFIDAVIT OF)ARTHUR F. SHERRELL
Defendant	)
STATE OF NEVADA	)
	) ss:
COUNTY OF CLARK	)

I, Arthur F. Sherrell, being first duly sworn upon my oath, do state as follows:

1. That I am a Plaintiff in the above captioned action.
2. I am unable to present affidavits in opposition to the Defendant's Motion for Summary Judgment on the following issues: (1) whether the Defendant determined deficiencies before issuing the Notices of Deficiency to us; (2) whether the Defendant recorded the assessments against us; (3) whether the Defendant gave the Notices of Assessment as required by Internal Revenue Code (IRC), §6303(a); (4) whether the Defendant gave the Notices of Intent to Levy as required by IRC, §6331(a); (5) whether the Defendant permitted IRS officers and agents to seize our property without the Director's warrant for distraint when the seizure was not carried out by the Director himself; (6) whether the Defendant perfected

service of the Notice of Seizure and Notice of Sale as required by IRC, §6335(a) & (b); (7) whether those IRS agents and officers who seized the property were authorized to make the seizures; (8) whether the Defendant seized property subject to forfeiture; and, (9) whether the Defendant was authorized to administratively seize the property if the property is not property subject to forfeiture.

3. I will use requests for admissions, requests for production of documents and non-uniform interrogatories and if necessary depositions.
4. I attempted to obtain most of the information regarding the determination of the deficiency, the recording of the assessments, sending the Notices of Assessment and Notices of Intent to Levy through the use of the Freedom of Information Act, the Privacy Act and IRC, §6203, but the Defendant was not forthcoming with the documents.
5. The facts and evidence material to the claims are known only to IRS officials with the National Computing Center in Martinsburg, West Virginia, the Ogden Service Center and the Las Vegas District offices. For example the record of the assessments alleged recorded against me, including the summary record of assessments and the support documents which identify me, the character of the liability assessment, the date of the assessment, the amount of the assessment will be within the custody of the Secretary of the Treasury or his delegate (which is believed to be in the Ogden Service Center).
6. I desire to obtain the discovery of the Chief, Examination Branch and the Chief, Accounting Branch with the Ogden Service Center and the Las Vegas District Office, the Las Vegas District Director and Ogden Service Center Director, and the IRS Officers and agents who seized or levied upon our

property, and an Official of the Martinsburg Computing Center.

7. These individuals will be able to identify the assessment procedures and records relating to Arthur F. Sherrell and identify the notice process pursuant to IRC, §§6211, 6212, 6213, 6303(a) and 6331.
8. The discovery will show the following facts: (1) that the Defendant did not determine deficiencies prior to issuing Notices of Deficiency; (2) that the Defendant did not record the assessment against me; (3) that the Defendant did not give the Notice of Assessment as required by IRC, §6303(a); (4) that the Defendant did not give the Notices of Intent to Levy as required by IRC, §6331; (5) that the Defendant permitted IRS officers and agents to seize our property without the District Director's Warrant for Distraint; (6) that the Defendant failed to perfect service of the Notice of Seizure and Notice of Sale as required by IRC, §6335(a) & (b); (7) that the officers and agents who seized the property were not authorized to make the seizure; and (8) that the property seized was not property subject to forfeiture and that the administrative seizure authority is limited to property subject to forfeiture.
9. There is the material fact in dispute as to whether or not an assessment exists. Form 4340, which this Court used in making its findings in its March 5, 1991 order, is essentially hearsay. It was prepared by a computer operator looking at a screen and transferring numbers from the computer screen to the form. Neither the individual who transferred the numbers to the form, nor the person certifying the form, nor Mr. Feldman have actual knowledge that the assessments exist, or that the notices were given. Additionally the documents were prepared after this litigation was begun and the records were not

prepared in the normal course of business of the IRS.

10. My labor is my property. The IRS has already seized and sold a boat and truck. I believe the IRS liens at issue in this action may also attach to my person.
11. I have reviewed the manual sections provided in respect to the use of the Form 4340. I have reviewed the decisions in UNITED STATES v. DIXON, 672 F.Supp. 503, aff'd 849 F.2d 1478 UNITED STATES v. BUFORD, 889 F.2d 1406 (5th Cir., 1989), (Exhibits 1 and 2). I have examined the forms 4340 provided by the Defendant with their December 1989 Motion to Dismiss, attached to the objectionable declaration of Ron Smith, and note they are documents prepared only after this litigation began. I have reviewed the decision in UNITED STATES v. HESSE, 90-1 U.S.T.C. 50049 (Exhibit 3), where the court discussed the importance of producing primary evidence and the foundation necessary for the admission of secondary evidence. I have noted that both DIXON, BUFORD and HESSE, supra, have all declared the Forms 4340 are secondary evidence.
12. I have reviewed the attached (Exhibit 4), Plaintiffs' Request for Admissions Under Rule 36, Federal Rules of Civil Procedure, in the case SIMPSON v. UNITED STATES, Civil No. 90-30021-WEA, and the Defendant's Response to the Request for Admissions. The Defendant admitted in the response that the information to prepare the Form 4340 was taken from the Integrated Data Retrieval System (IDRS), the IRS computer.
13. On August 24, 1992, I, Arthur F. Sherrell, received copies of my Individual Master Files from the Ogden Service Center. (Exhibit 5). I have reviewed these documents and determined the Master File in name contains the following, assessment dates: for the year 1982, 11-28-88 and 9-11-89; for the year 1983, 12-26-

88; for the year 1984, 9-11-89; for tax year 1985, 2-25-91; for the year 1986, 2-18-91; for the year 1987, 2-25-91; and, for the year 1988, 5-6-91.

14. The October 5, 1989 Forms 4340 proffered by the government show the following assessment dates: for the year 1982, 11-28-88 and 9-11-89 for the year 1983, 12-26-88. Because this Court has refused to grant my wife and I leave to amend our complaint there are no documents reflecting the assessments alleged to have been made for the years 1984-1988.
15. The IMF reflects that the Notice of Assessment for the year 1982 was sent on November 28, 1988 for the November 28, 1988 assessment. The Notice of Assessment is reflected by the MF Stat 21 Code at the end of the IMF. The IMF does not reflect that a notice was sent for the September 11, 1989 assessment.
16. The Form 4340 proffered by the government claims that the Notice of Assessment was sent on September 11, 1989. This is referenced by the Statement of Change to Your Account on Page 2 of 2 of the Form 4340 for the year 1982.
17. The IMF as of October 5, 1989, from which the Forms 4340 were prepared, contained significantly more information than is contained on the forms 4340. There are other transactions posted to the Master File which were not transcribed to the Forms 4340. Despite the fact that Ron Smith certified that they reflected a true and complete transcript, as of October 5, 1989, my 1982 and 1983 IMFs reflect the following disparity in number of transactions reflected when compared with the number of transactions on the Form 4340.

YEAR	IMF	4340
1982	59	27
1983	31	9

18. I have compared the number and dates of assessment between the IMF sent to me and the Forms 4340, and the IMF contains dates not reflected on the 4340.
19. Contained on both the Forms 4340 and the Individual Master File are Document Locator Numbers (DLN's). In the 14 digit number is a control date. The date is found by counting to the 6th, 7th and 8th digits. If the number is over 400 it was posted by the computer, if under 400 done manually. If the number is over 400 you must subtract 400 from number to arrive at the julian date. (Exhibit 6).
20. These DLN's are assigned to supporting documents for computer entries made by terminal operators at the IRS. Plaintiffs would seek through their discovery to have the supporting documentation for the computer entries in order to challenge the accuracy of the Forms 4340.
21. The DLN related to the November 28, 1988 assessment for the year 1982 is 29247-709-10044-8 (See IMF); the date is 709, or the Three hundred and ninth day of the year, which is November 4, 1988. This DLN on the master file also has a cycle date of 8846. The cycle date is the week when the transaction posts to the computer in Martinsburg, West Virginia. Week 8846 is the week beginning Monday November 14, 1988 and ending Friday November 18, 1988. (Exhibit 7).
22. In Martinsburg the National Computer Center picks up the transaction code of 300, and creates a magnetic tape extract to be returned to the Ogden Service Center. This extract may or may not have been placed on the RACS (Revenue Accounting Control System) to be assessed. It is the Revenue Accounting Control System (RACS) which generates the computer record of assessment (Form 23C or

RACS 006). The IMF merely reflects that the Defendant anticipates that the data may have been returned to the Service Center from Martinsburg, West Virginia by the November 28, 1989 date.

23. The IMF is not used to record the assessment after the Summary Record of Assessment is signed by the Assessment Officer. The alleged assessment date, as well as the Notice dates are usually and customarily placed into the computer anywhere from 10 days to 2 weeks prior to the assessment actually taking place. See Exhibit 4, in SIMPSON, supra, where the Government admits that the 23C date, which is the alleged assessment date, is forecast as the Monday of the 2nd week following the week in which these transactions are processed at the National Computer Center. See Also (Exhibits 8 and 9)

24. I have followed the recent news and government reports on IRS over assessment of its accounts receivable inventory. I have a copy of the Statement of Jennie S. Stathis, Director, Tax Policy and Administration Issues, General Government Division, given to the Oversight Subcommittee, Committee on Ways and Means, House of Representatives, GAO/T-GGD-90-19. (Exhibit 10)

25. In the statement, the computer problems of the IRS relating to the ability to account for that which is and is not assessed is well established. I am entitled to discover into the accuracy of the computer system and to determine if I am a victim of accounting problems. (Exhibit 10)

26. I have reviewed the General Accounting Office report on the IRS Service Centers in Austin, Texas and Fresno, California, GAO/GGD-85-89, September 30, 1985. The report cites numerous difficulties in balancing the general and subsidiary ledgers due to returns processing problems and the introduction of

RACS. Pg. 18. (Exhibit 11). "Problems were encountered in balancing the general ledger because the audit trail under RACS is significantly different than under the old manual general ledger systems. According to a Fresno official, prior to RACS each journal entry was supported by a document which the staff could use to balance the general ledger with the subsidiary ledgers."

27. Due to the use of computers which do not directly communicate with each other, IDRS and RACS, the necessity to transport tapes between the Service Center and the National Computing Center in Martinsburg, West Virginia; the fact that NCC must transcribe and translate data contained on service center tapes into extracts to be returned on tape to the Service Center and the forecasting of the assessment date to the RACS Computer, the system is ripe for errors. In the GAO report identified above at pg. 46: "In 1984 the notice review unit, which reviews the math error notices would get the printed notices on monday; this year it got the notices on Tuesday. This creates a problem because the notices must be mailed by Friday so that the taxpayer will receive them by the following Monday, which is the assessment date on the notices."
28. Since the Notice date and the assessment date are usually the same, here the government admits that the Notices are being sent out before the Summary Record of Assessment is signed by the assessment officer.
29. Attached here as Exhibit 12 is an Affidavit of Philip L. Haggard. This Affidavit and the Exhibits attached thereto show that assessments for the years 1988 and 1989 were allegedly made against him on August 10, 1992. The Notice of Assessment is also dated August 10, 1992. As the Affidavit and the Notarized

Statement on the back of the Assessment Notice show Mr. Haggard received his notice on August 8, 1992.

30. Attached hereto as Exhibit 13 is an Affidavit of Sharon L. Haggard. This Affidavit also shows that the same circumstances occurred for the assessments for 1988 and 1989.
31. Attached hereto as Exhibit 14 is an Affidavit of Randal W. Howard. On August 10, 1992, he was also allegedly assessed and given notice of the assessment for the year 1989. Like the Haggards he also received the Notice on August 8, 1992.
32. As Mr. Howard's Affidavit also shows he received a copy of his IMF "specific transcripts" for the years 1983 and 1984. The date of the transcripts is May 17, 1990. The transcripts already reflect a Trans-action Code (TC) 300 date May 28, 1990. For the years 1983 and 1984 Mr. Howard indicates that he was assessed on May 10, 1990. Yet the May 10, 1990 assessment date is not reflected on this transcript.
33. It is clear from these three people that the Defendant has been projecting what it believes should happen, with respect to the assessments and the Notices, by entering transactions into the computer before the event actually occurs. Because the assessment dates at issue were forecast, I am entitled to discover whether the assessments were properly recorded.
34. In a deposition of May 15, 1989 in the case of CHANDLER v. UNITED STATES OF AMERICA, the following statement was made upon the questioning of Ms. Keesler at Page 24: "Q - What kinds of taxes or types of taxes do you assess? A - I don't assess taxes. Q - When you were in the service center did you ever assess a tax? A -Not myself personally, no." (Exhibit 15).
35. Ms. Keesler was an assessment officer in the Ogden

Service Center, which is where the assessments are allegedly recorded against me. She was there at the time I was alleged assessed for these years.

36. In the GAO 1989 Annual Report on GAO's Tax-Related Work dated March 1990, GAO/GGE-90-46, at page 13, there is a discussion related to computer implementation problems. The report notes that the Martinsburg, West Virginia Computing Center had identified about 900 software errors in the system; that the IRS has not formally accepted the computer system as of January 1989 because the contractor had not delivered acceptable documentation describing how the system's software worked; that in November 1987 systems were installed in all 10 Service Centers despite the problems. (Exhibit 16).
37. I have also received a copy of an April 12, 1990 IRS Memoranda dated, regarding a crisis program called the Form 23C Recovery Project. This project identified and corrected system wide problems related to improperly prepared and executed Forms 23C, Summary Record of Assessment. Without discovery I will not be able to determine if a valid assessment has been done against myself and my wife. (Exhibit 17).
38. The regulation at 301.6203-1 states: "The district director and the director of the regional service center shall appoint one or more assessment officer. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment." Due to Ms. Keesler's comment in the deposition there is serious questions concerning the signing of any record of assessment.

FURTHER AFFIANT SAITH NOT

EXECUTED this 19th day of August, 1993.

/s/ Arthur F. Sherrell
ARTHUR F. SHERRELL

Before me appeared, Arthur F. Sherrell, this 19th day of August, 1993.

/s/ Ginny Kosior
NOTARY PUBLIC
My commission expires
April 23, 1994

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Certificate of Assessments and Payments

Name	Address	EIN or SSN
Arthur F. Sherrell	5132 Newton Drive Las Vegas, Nevada	487-18-8774

Date	Explanation of transactions	Assessment (abatement)	Credit (Credit Reversal)
(a)	(b)	(c)	(d)
11-28-88	Substitute for Return Audit Assessment	396.00	
11-28-88	Tip Penalty	198.00	
11-28-88	Interest	326.38	
6-22-89	Payment		234.73
7-13-89	Payment		96.43
7-19-89	Payment		117.81
7-22-89	Payment		96.43
7-25-89	Payment		237.85

(Note: Columns e, f, g, and h are continued on next page; and remaning transactions on next six pages)

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
396.00	29247-634-90233-9	11-28-88	12-31-82
594.00			
920.38			
685.65			
589.22			
471.41			
374.98			
137.13			

Certificate of Assessments and Payments

Name	Address	EIN or SSN
Arthur F. Sherrell	5132 Newton Drive Las Vegas, Nevada	487-18-8774

Date (a)	Explanation of Transactions (b)	Assessment (abatement) (c)	Credit (Credit Reversal) (d)
7-25-89	Designation Payment of fees and collection costs		212.15
8-11-89	Payment		206.34
8-16-89	Payment		259.70
8-21-89	Payment		101.89
9-4-89	Fees and collection costs	24.00	
9-5-89	Payment		222.24
9-11-89	Additional tax assessment	2,845.00	

(Note: Columns e, f, g, and h to these transactions are continued on next page;)

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
(75.02)			
(281.36)			
(541.06)			
(642.95)			
(618.95)			
(841.19)			
2,003.81			

Certificate of Assessments and Payments

Name	Address	EIN or SSN
Arthur F. Sherrell	5132 Newton Drive Las Vegas, Nevada	487-18-8774

Date

(a)	Explanation of Transactions (b)	Assessment (abatement) (c)	Credit (Credit Reversal) (d)
9-11-89	Negligence Penalty	1,514.36	
9-11-89	Estimated Tax penalty	265.38	
9-11-89	Failure to File Timely Penalty	786.50	
4-15-83	Credit for withholding		95.00
9-11-89	Payment		125.24
9-18-89	Fees and collection costs	212.15	
9-19-89	Payment		263.86
9-20-89	Payment		101.89

(Note: Colums e, f, g, and h for these transactions are continued on next page;)

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
3,518.17			
3,783.55			
4,570.05			
4,475.05			
4,349.81			
4,561.96			
4,298.10			
4,196.21			

Certificate of Assessments and Payments

Name	Address	EIN or SSN
Arthur F. Sherrell	5132 Newton Drive Las Vegas, Nevada	487-18-8774

Date (a)	Explanation of Transactions (b)	**Assessment** (abatement) (c)	**Credit** (Credit Reversal) (d)
9-20-89	Payment		124.35
9-27-89	Payment		226.40
9-27-89	Payment		101.89

The Statement of Change to your account was mailed out 09/11/89

(Note: Colums e, f, g, and h for these transactions are continued on next page:)

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complet transcript for the period stated, and all assessments, penalties, interests, abatements, credits, refunds and and advance or unidentified payment relating thereto is disclosed by the records of this office as of the date of this certification are shown therein.

Signature	Location	Date
/s/ Ron Smith,	300 Las Vegas Blvd. So., Las Vegas, Nevada	10-05-89

Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
4,071.86	29254-448-00512-9	12-26-88	12-31-83
3,845.46			
3,743.57			

APPENDIX C
STATUTORY PROVISIONS

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STATUTES

I. INTERNAL REVENUE CODE

Sec. 6103. **Confidentiality and disclosures of returns and return information.**

(a) General Rule.

Returns and return information shall be confidential, and except as authorized by this title --

(1) no officer or employee of the United States

(2) no officer or employee of any State, any local support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), (l)(12), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions -- For purposes of this section --

(2) Return Information -- The term "return information" means -

(A) a taxpayer's identity, the nature source, or amount of his income, payments, receipts, deductions, credits, assets, liabilities, net worth, tax liabilities, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being or will be examined or subject to other investigation or

processing, or an other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(k) **Disclosure of certain returns and return information for tax administration purposes.**

(6) Disclosure by internal revenue officers and employees for investigative purposes. An internal revenue officer or employee may, **in connection with his duties relating to** any audit, collection activity, ... disclose return information to the extent **such disclosure is necessary in obtaining information**, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount

to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation. (emphasis added)

Sec. 6203. **Method of Assessment**

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer with a copy of the record of the assessment.

Sec. 6303. **Notice and demand for tax**

(a) General Rule

Where it is not otherwise provided by law by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

Sec. 6331. **Levy and Distraint.**

(a) Authority of the Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further some as shall be sufficient to cover the expenses of the levy) by **levy** upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for payment of such tax. Levy may be

made upon the accrued salary or wages of any officer, employee or elected official of the United States, the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. [(*in part*) (*emphasis added*)]

(d) Requirement of notice before levy.

(1) In general. Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 10-day requirment. The notice required under paragraph (1) shall be--

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address.

no less than 10 days before the day of the levy..

(3) Jeopardy. Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

Sec. 7431. **Civil damages for unauthorized disclosure returns and return information.**

(a) In General.

(1) Disclosure by employee of United States. If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. (emphasis added)

(b) No liability for good faith but erroneous interpretation.

No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the Plaintiff in an amount equal to the sum of --

(1) the greater of --

(A) $ 1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of -- (i) the actual damages sustained by the Plaintiff as a result of such unauthorized disclosure, plus, (ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

(d) Period for bringing action.

Notwithstanding any other provision of law, an action to enforce any liability under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

II. 28 U.S.C.

§ 2410. Actions affecting property on which the United States has a lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party

in any civil action or suit in any district court or in any State court having jurisdiction of the subject matter--

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whos liability created the lien and, if a notice of the tax lien was filed, the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States Attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

§ 2463. Property taken under revenue law not repleviable

All property taken or detained under any revenue law of the United States shall not be repleviable, but

shall be deemed to be in the custody of the law and subjedt only to the orders and decrees of the courts of the United States having jurisdiction thereof.

REGULATIONS

26 CFR, § 301.6103(k)(6)-1. Disclosure of return information by internal revenue service officers and employees for investigative purposes.

(b) ***Disclosure of return information in connection with official duties relating to examination, collection activity, civil or criminal investigation, enforcement activity, or other offense under the internal revenue laws.*** In connection with the performance of official duties relating to any examination, collection activity, civil or criminal investigation, enforcement activity, or other offense under the internal revenue laws, an officer or employee of the Service or Office of the Chief Counsel therefor is authorized to disclose return informa-tion (as defined in section 6103(b)(2)) in order to obtain necessary information relating to the following --

> **(6)** To establish or verify the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayer has an interest, to ascertain the amount of any liability described in subparagraph (3) of this paragraph to be collected, or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability. (emphasis added)

26 CFR, §301.6203-1. METHOD OF ASSESSMENT

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint

assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of the tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record of assessment is signed by the assessment officer.

COURT RULES

I. FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the parties favor as to all or any part thereof.

(f) When affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party canny for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

II. FEDERAL RULES OF APPELLATE PROCEDURE

Rule 35.Determination of Causes by the Court in Banc. (a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintian uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service by a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc. Suggestion Does not Stay Mandate. If a person desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortend or enlarged by order or by local rule. However, in all civil cases in which the United States or any agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petition decisres to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requrested by the court, but a petition for rehearing will ordinalrily not be granted in the absence of such request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

III. FEDERAL RULES OF EVIDENCE

Rule 802. Hearsay Rule

Hearsay is not admissable except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum report, record or data complilation, in any form, of acts, events, condictions, opinions, or diagnoses, made at or near the time by, or form information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity to make the memorandum, report, record, or data compilation, all as shown by the testimoney of the custodian or other qualified witness, unless the source of infomation or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as unde in this paragraph includes business, institution, association, profession, occupation, and colling of every kind, whether or not conducted for profit.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the officer or agency, or (B) matters observed purusant to the duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condiction precedent to admissability is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be taht of the United States, or of any State, district, Commonwealth, territory, or insular possession

thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subsdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recored or filed in a public office, including data complilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court puruant to statutory authority.

Rule 1002. Requirement of Origianl.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1004. Admissability of Other Evidence of Contents.

The original is not required, and other evidence of the contents of writing, recording, or photograph is admissable if --

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be abtained by any available juridicial process or procedure; or

(3) Original in possession of opponent. At a time when an original is under the control of the party against whom offiere, that party was put on

notice, by pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

COMMISSIONER'S DELEGATION ORDERS

Order No. 161 (Rev. 4).
Effective date: 10-31-87
Authority to Affix the Seal of the Department of Treasury

1. Pursuant to the authority vested in the Commissioner of Internal Revenue by Treasury Directive 12-01, authority is delegated to the following officials of the Internal Revenue Service to affix the Seal of the Department of the Treasury in the authentication of originals and copies of books, records, payers, writing, and documents of the Department, for all purposes, including the pruposes authorized by 28 U.S.C. 1733(b).

a. Deputy Assistant commissioner Examination.

b. Director, Office of Disclosure

2. The Director, Office of Disclosure, is authorized to maintain custody of the die of the Treasury Seal for the Internal Revenue Service.

3. This authority may not be redelegated.

4. Delegation Order No. 161, (Rev. 3) effective January 28, 1987, is sperseded.

/s/ Charles H Brennan
Deputy Commissioner (Operations)

Order No. 198 (Rev. 2)
Effective date: 5-12-86
Authority to Affix the Official Seal of Office of the Internal Revenue Service and to Certify to the Authenticity of Official Documents

(1) Pursuant to the Authority vested in the Commissioner of Internal Revenue by Treasury Department Order 150-37 and 26 CFR 301.7701-9, the authority granted to Regional Commissioners, District and Service Center Directors, and the Director, Data Center by 26 CFR 301.7514-1, to affix the official seal of office to any certificate or attestation required to be made by the officer for whos office such seal is established in authentication of originals and copies of books, records, papers, writings and documents of the Internal Revenue Service in the custody of such officers, for all purposes including the purpose of 28 U.S.C. 1733(b), Rule 44 of the Federal Rules of Civil Procedure, and Rule 27 of the Federal Rules of Criminal Procedure, may be redelegated only to Disclosure Officers and to spervisory personnel to the extent necessary within the exercise of their official duties.

(2) The authority delegated in paragraph (1) does not extend to:

(a) Affixing such seal to material to be publihsed in the Federal Register, and

(b) Affixing the seal of the District Director to the certification of copies of books, records, papers, writings or documents in his/her custody in any case in which, pursuant to Excecutive Order, Treasury Decision, or the Statement of Procedural Rules, such copies may be furnished to applicants only by the Commissioner.

(3) Under the authority granted to the Commissioner of Internal Revenue by 26 CFR 301.7622-1, there is hereby delegated to the following officials the authority to certify to the authenticity of originals and copies of books, records, papers, writings, and documents of the Internal Revenue Service in the custody of such officer, for all purposes, including the prupose of 28 U.S.C. 1733(b), Rule 44 of the Federal Rules of Civil Procedure, and Rule

27 of the Federal Rules of Criminal Procedure:

(a) Regional Commissioners

(b) Assistant Commissioner (International)

(c) District Directors

(d) Service Center Directors

(e) Director Data Center.

(4) The authority in paragraph (3) may be redelegated only to Disclosure Officers and to supervisory personnel to the extent necessary within the exercise of their official duties.

(5) Delegation Order 198 (Rev. 1) , effective January 25, 1985, is superseded.

/s/ James I. Owens
Deputy Commissioner.